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IN THE

Supreme Court of the United States

OCTOBER TERM 1997

KEN MIZUNO AND DOMINIC GENTILE,

Petitioners

v.

DUKE SALISBURY, CHAPTER 11 TRUSTEE,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

Whether this Court should grant review to resolve a split of authority within the Circuits as to whether a District Court remand order to a Bankruptcy Court, pursuant to 28 U.S.C. § 158, is final and reviewable by a Court of Appeals.

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Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 125 F.3d 858 (9th Cir. September 17, 1997) as (unpublished) *In re Ken Mizuno, Debtor.*

Jurisdiction of this Court

The judgment below was entered on September 17, 1997, App. 1a, and rehearing was denied on December 16, 1997, App. 20a. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1254.

Statutory Provisions at Issue

28 U.S.C. § 158 provides in relevant part that:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
>
> . . . .
>
> (d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

Statement of Facts

On June 19, 1992, Kengo Ohashi, the Japanese Administrator of the Japanese bankruptcy estate of Ken Mizuno, filed an involuntary Chapter 11 petition as the sole "Petitioning Creditor" against Ken Mizuno in the Bankruptcy Court for the Central District of California. Under Japanese bankruptcy law, Mr. Ohashi's administrative authority was

limited to property located in Japan. Mr. Ohashi's involuntary bankruptcy petition against Mizuno was pursuant to 11 U.S.C. § 303, and not as an ancillary proceeding to a foreign bankruptcy under 11 U.S.C. § 304.

Mr. Ohashi simultaneously filed a "consent" to the involuntary petition he had filed, and the Bankruptcy Court entered an order for relief on the same day as the filing of the bankruptcy petition, June 19, 1992. Mr. Mizuno later unsuccessfully moved to vacate the order for relief. On October 7, 1992, the Bankruptcy Court denied the motion to vacate in an order which promised findings and conclusions within sixty days but otherwise provided no explanation for the refusal to vacate the order of relief. No subsequent findings were entered, and Mr. Mizuno did not appeal the October 7, 1992 Order, thus making it a final order.

Thereafter, Mr. Ohashi never sought to be appointed as trustee for the Mizuno Chapter 11 estate, nor did he hold himself out to be the debtor in possession of that estate. On January 11, 1995, Mr. Ohashi, purporting to represent the "Bankruptcy Estate of Ken Mizuno", filed an adversary action in the Mizuno bankruptcy proceedings against Mr. Mizuno and his criminal defense counsel Dominic Gentile.[1] The adversary complaint alleged that Ohashi was properly in control of the Mizuno estate because of the October 7, 1992 unappealed order denying Mizuno's motion to vacate the order of relief.

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[1] Mr. Mizuno, a Japanese citizen and resident, was indicted on June 19, 1992 in the United States District Court for the District of Nevada for the international transportation of alleged fraud proceeds from Japan into the United States. The gist of the criminal allegations are that Mizuno, in concert with others, fraudulently oversold memberships in a Japanese country club, and then transported the proceeds of this alleged fraud into the United States.

Mr. Ohashi's adversary complaint alleged that Mizuno and his criminal defense counsel were violating the automatic stay applicable to the Mizuno bankruptcy proceedings by prosecuting a petition for relief in the United States District Court for the District of Nevada from a criminal forfeiture order entered against a related company previously owned by Mr. Mizuno known as Ken International (KI). The KI criminal forfeiture order had been entered in October 1993 pursuant to a plea agreement between the federal government and Mr. Ohashi, purporting to act as the "administrator" of Ken International Chapter 11 estate. Substantial assets in the United States were forfeited, and, pursuant to the agreement, most were ultimately transferred to Ohashi for distribution to another Japanese corporate bankruptcy estate.

Ohashi moved for summary judgment on his automatic stay violation complaint, which was granted by the Bankruptcy Court on March 10, 1995. Defendants Mizuno and Gentile opposed summary judgment on a variety of grounds, including that Ohashi lacked standing to bring a stay violation claim on behalf of the Mizuno estate because he was neither its trustee nor its debtor in possession. Bankruptcy Court entered a permanent injunction against Mizuno and his counsel prohibiting them from violating the stay. The Bankruptcy Court ruled that Ohashi's standing to represent the Mizuno estate was secured by the unappealed and final order of October 7, 1992 denying Mizuno's motion to vacate the order of relief.

Mizuno and his counsel appealed the Bankruptcy Court's first summary judgment ruling,[2] and argued again on appeal that Ohashi lacked standing to initiate or to prosecute the

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[2] The Bankruptcy Court entered final judgment as to Mr. Mizuno on March 10, 1995, and later entered partial summary judgment as to his counsel; the District Court granted counsel leave to appeal on an interlocutory basis.

adversary action, and that this lack of standing deprived the Bankruptcy Court of jurisdiction over the adversary complaint. In particular, Mizuno and Gentile contended that, under the Bankruptcy Code, a Chapter 11 debtor becomes the debtor-in-possession of estate property upon entry of the order for relief, and remains so until the statutory procedures for his ouster have been perfected, none of which had been invoked in the Mizuno bankruptcy proceedings. *See* 11 U.S.C. §§ 1104(a) (court may, upon application notice hearing, and for cause, order appointment of trustee); 11 U.S.C. § 1104(c) (upon court order, U.S. Trustee shall appoint a qualified, disinterested trustee); 11 U.S.C. § 1107 (a) absent appointment of trustee, debtor shall have all rights and powers of trustee). *See also* F.R.Bank. P. 6009 (trustee or debtor may represent estate). By contrast, the standards and procedures for commencing an involuntary bankruptcy under 11 U.S.C. § 323 do not address or resolve the issue of estate administration, rather they merely establish whether insolvency has been proven. *See, e.g.* 11 U.S.C. § 303; F.R. Bank P., 1003, 1011, 1018. In turn, Ohashi contended on appeal that the District Court could not "revisit" the issue of Ohashi's standing because that had allegedly been conclusively and finally adjudicated by the final October 7, 1992 Order denying the motion to vacate the order of relief.

On June 23, 1995, the District Court, sitting on appeal, reversed the summary judgment, and held that Ohashi lacked standing to bring the adversary action because he was neither the trustee nor the debtor of the Mizuno estate. App. 17a. More specifically, the District Court reviewed the October 7, 1992 order and concluded that it neither expressly or by implication conferred standing upon Ohashi to act as the trustee or debtor of the estate, which are prerequisites for standing to bring an automatic stay violation complaint. In addition, the District Court, citing this Court's opinion in *National Organization of Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994), observed

that lack of standing deprives a court of subject matter jurisdiction. Thus, the District Court reversed the bankruptcy court judgment and remanded the case back to the Bankruptcy Court. App. 16a.

Ohashi did not thereafter appeal this June 21, 1995 adverse standing ruling to the Ninth Circuit. Instead, Ohashi filed another motion in the Bankruptcy Court for summary judgment on remand, contending that his standing had been conclusively resolved by the October 7, 1992 Order. Mizuno and Gentile opposed summary judgment on the ground, among others, that Ohashi's standing had previously been adjudicated in the earlier appeal, and that preclusion doctrines prevented a second adjudication of this unappealed District Court ruling based upon the same record and the same claim.

On September 5, 1995, the Bankruptcy Court granted Ohashi summary judgment for a second time, holding again that the October 7, 1992 Order had conclusively adjudicated Ohashi's standing. The Bankruptcy Court held that, by this 1992 Order, it had conferred upon Ohashi the powers of a debtor in possession of the Mizuno estate. The Bankruptcy Court ruled that Mr. Mizuno and Mr. Gentile had violated the automatic stay and imposed stay damages of $300,000, representing Ohashi's legal fees for prosecuting the adversary complaint up through the first appeal in the District Court.

Mizuno and Gentile appealed the September 5, 1995 Bankruptcy Court judgment to the District Court, contending again that Ohashi lacked standing. On November 23, 1995, the District Court agreed, and remanded with instructions to dismiss the complaint. App. 9a. The District Court held that, in an American bankruptcy estate under Chapter 11, the Bankruptcy Code governs who has estate administration powers, and the procedures by which they are transferred. The District Court rejected the Bankruptcy Court's claims that

either comity or the Code authorized a Bankruptcy Court to oust a debtor in possession (Mizuno) and transfer his estate administration powers to a non-debtor such as Ohashi, as opposed to the Code-authorized transfer of such powers to an eligible and appointed estate trustee. App. 9a-15a.

Ohashi appealed this second remand order to the Ninth Circuit Court of Appeals. Ohashi also moved the Bankruptcy Court to convert the Mizuno bankruptcy case to an ancillary proceeding under 11 U.S.C. § 304 or to appoint a trustee. On December 15, 1995, Mr. Salisbury was appointed trustee of the Mizuno estate. Mr. Salisbury likewise filed an appeal from the District Court's November 23, 1995 ruling.

On September 17, 1997, more than two years after the District Court's original remand order holding that Ohashi lacked standing, the Ninth Circuit reversed the District Court, and held that Ohashi had standing by virtue of the October 7, 1992 order denying Mizuno's motion to vacate the order of relief. App. 1a. In order to reach this conclusion, the Ninth Circuit held that unappealed June 23, 1995 District Court order remanding the adversary action to the Bankruptcy Court (for lack of standing by Ohashi and jurisdiction by the Court) was not final or appealable, and that Bankruptcy Court's subsequent reconsideration of Ohashi's standing was within the scope of the remand. App. 3a. The Ninth Circuit went on to hold that the earlier, October 7, 1992 order denying the motion to vacate the order of relief, was entitled to preclusive effect, and that this 1992 Order conclusively established that Ohashi had standing to initiate the action for the automatic stay violation in 1995.

In other words, the Ninth Circuit held that the unappealed June 21, 1995 District Court order remanding the adversary complaint back to the Bankruptcy Court for lack of jurisdiction was not a final or appealable judgment. Because the June 1995

remand order lacked finality and was therefore unappealable, the Ninth Circuit concluded that Ohashi was not precluded from relitigating the issue of his standing in Bankruptcy Court. The Ninth Circuit then implicitly reversed the unappealed June 23, 1995 District Court ruling by holding (to the contrary) that Ohashi's standing had been conclusively established by the October 7, 1992 order affirming the original order of relief in bankruptcy, such that neither Ohashi nor his successor Salisbury were required to relitigate the issue in the 1995 adversary action. In effect, the Ninth Circuit held that the Bankruptcy Court was free, on remand from the District Court's July 1995 unappealed order, to reach the opposite jurisdictional conclusion as had the District Court based upon the same record and relying on the same order (of October 7, 1992) which had been found inadequate by the District Court to confer standing upon Ohashi.

ARGUMENT

A substantial split of Circuit authority exists as to the finality of District Court remand orders to Bankruptcy Courts such that the finality of a District Court remand order to a Bankruptcy Court, based upon a finding of no subject matter jurisdiction, raises important issues regarding the uniform application of bankruptcy law and procedure.

The federal circuit courts are divided as to the finality of District Court remand orders issued pursuant to 28 U.S.C. § 158, when District Courts sit as appellate courts over Bankruptcy Court rulings. Compare *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3d Cir. 1982) (remand orders final), *cert. denied*, 459 U.S. 1206 (1983) with *In re Riggsby*, 745 F.2d

1153 (7th Cir. 1984) (remand orders not final) (Posner, J.).[3] This split of authority is of longstanding, and has been acknowledged by lower courts since at least 1985. *See, e.g., In re Commercial Contractors, Inc.*, 771 F.2d 1373, 1374 (10th Cir. 1985) (noting split in circuits). Indeed, the disarray of precedent on this issue has caused one respected bankruptcy commentator to characterize the question as "hopelessly confused." 1 Collier, ON BANKRUPTCY, ¶3.03[6][b] at 3-194 (15th ed. 1995).[4] *See also* Note, WHEN IS AN ORDER FINAL?: A RESULT-ORIENTATED APPROACH TO THE FINALITY REQUIREMENT FOR BANKRUPTCY APPEALS TO FEDERAL COURTS, 74 Minn. L. Rev. 1337 (1990)(describing conflicts).[5]

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[3] The Third Circuit's *Marin Motor Oil* opinion has been endorsed directly or indirectly by the Eighth and Sixth Circuits. *In re Bestman*, 720 F.2d 484 (8th Cir. 1983); *In re Gardner*, 810 F.2d 87 (6th Cir. 1987). The Seventh Circuit's contrary holding in *Riggsby* is followed by the First, Second, Fourth, Fifth, Tenth, and Eleventh Circuits. *In re Abdallah*, 778 F.2d 75, 76 (1st Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986); *In re Prudential Lines, Inc.*, 59 F.3d 327, 331 (2d Cir. 1995); *In re The Wallace & Gale Co.*, 72 F.3d 21, 24 (4th Cir. 1995); *In re Aegis Specialty Mktg, Inc.*, 68 F.3d 919 (5th Cir. 1995); *In re Wiston XXIV Ltd. Partnership*, 988 F.2d 1012 (10th Cir. 1993); *In re TCL Investors*, 775 F.2d 1516, 1518 (11th Cir. 1985).

[4] Indeed, the Ninth Circuit's own precedent in this area is contradictory, compare *In re Martinez*, 721 F.2d 262, 265 (9th Cir. 1983) (remand not final) with *In re Bonner Mall Partnership*, 2 F.3d 899, 904-05 (9th Cir. 1993) (remand order final if central issue is legal and (1) resolution could obviate need for fact finding, or (2) review would materially aid bankruptcy court on remand), motion to vacate denied and case dismissed as moot, 115 S. Ct. 386 (1994)). *See In re Commercial Contractors, Inc.*, 771 F.2d 1373, 1375 (10th Cir. 1985) (noting that one panel of Ninth Circuit has adopted *Marin* position while another panel adopted *Riggsby*).

[5] *See generally*, Hennigan, TOWARD REGULARIZING APPEALABILITY IN BANKRUPTCY, 12 Bank. Dev. J. 583 (1996).

In general, the courts which hold remand orders to be final, base their conclusion on the fact that a district court ruling on appeal finally resolves the appeal, and the circuit courts exercises essentially the same scope of appellate review of the bankruptcy court, therefore requiring no further delay or development of the record *Marin*, 689 F.2d 445, 447-48. Conversely, those courts which hold to the majority view that remand orders are non-final have focused on the fact that some further proceedings are required before the bankruptcy court, and have analogized this process to remands to administrative agencies. *Riggsby*, 745 F.2d at 1156. Some opinions, while adhering to the majority view that district remand orders are generally not final, have made exceptions when the remand is merely "ministerial," such as to correct a purely formal defect. *In re Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993) (Posner, J.). *Accord In re Jove Engineering, Inc.*, 92 F.3d 1539, 1548 (11th Cir. 1996) (remand order final when matter remaining "is a ministerial duty that does not require significant judicial activity involving considerable discretion."). *See Gulf Refining Co. v. United States*, 269 U.S. 125, 136 (1925) (remand final if only ministerial duty left).

This Court has not previously addressed the issue of the finality of district court remand orders to a bankruptcy court, although this Court in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992) held that 28 U.S.C. § 158 did not displace 28 U.S.C. § 1291 as a proper means for seeking court review. This issue is one of widespread concern to bankruptcy litigants, because, under well established precedent from this Court, a failure to appeal a final judgment waives any right to challenge the order, and implicates preclusion doctrines. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-402 (1981) (failure of certain parties to appeal adverse antitrust standing ruling precluded reliance on subsequent reversal on appeal; rejecting Ninth Circuit ruling that res judicata should be

flexibly applied to relieve party from consequences of failure to appeal erroneous judgment).

Here, the finality of the District Court's June 21, 1995 remand order for lack of subject matter jurisdiction is a dispositive issue. The original bankruptcy judgment of March 10, 1995 was final, and if the District Court's subsequent June 1995 ruling that Ohashi lacked standing (and the Bankruptcy Court therefore lacked jurisdiction) was likewise final, then Ohashi was obligated to appeal that ruling to the Ninth Circuit, rather than relitigating the issue before the Bankruptcy Court. The June 21, 1995 order is unequivocal, as the District Court stated that it "finds that Plaintiff lacked standing to bring the adversary action" App. 17a. Absent plaintiff standing to bring suit, neither the Bankruptcy Court nor the District Court had jurisdiction to proceed any further on the merits of Ohashi's complaint. *National Organization of Women, Inc.*, 510 U.S. 249, 255 (1994). Whether the District Court's standing ruling was correct, or erroneous, is a matter which could only be resolved by a higher court -- the Ninth Circuit. If the District Court's June 1995 finding of no jurisdiction was final, Ohashi could not thereafter challenge this ruling in the Bankruptcy Court or the Ninth Circuit, absent a timely and successful appeal.

In analogous circumstances, this Court, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-402 (1981), ruled that the res judicata doctrine precluded an unsuccessful antitrust plaintiff from relitigating an adverse, but erroneous, antitrust standing ruling when the litigant failed to appeal the ruling, even though other parties successfully appealed. *See Local 322, Allied Indus. Workers of America v. Johnson Controls, Inc.*, 969 F.2d 290, 292 (7th Cir. 1992) (citing Moitie, party's failure to seek certiorari precludes reliance upon reversal by Supreme Court). This Court has firmly held that a litigants' failure to appeal is a considered and

free choice, and that courts should not relieve litigants from the consequences of such "free, calculated, deliberated choices." *Ackermann v. United States*, 340 U.S. 193, 212 (1950).

Moreover, the issue addressed by the District Court in its June 1995 order--a court's subject matter jurisdiction--is one that this Court and lower federal courts have consistently held warrants application of res judicata, even if the jurisdictional ruling was erroneous. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 n.9 (1982) ("It has long been the rule that principles of res judicata apply to jurisdictional determinations--both subject matter and personal."); *North Georgia Elec. Membership Corp. v. Calhoun*, 989 F.2d 429, 432 (11th Cir. 1993); *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1293 (5th Cir. 1992); *Cutler v. Hayes*, 818 F.2d 879, 888-89 (D.C. Cir. 1987) (collateral estoppel applies to prior standing ruling because jurisdictional). If the District Court's June 21, 1995 remand order was final, it would have been a binding jurisdictional ruling entitled to preclusive effect. As a final jurisdictional ruling, neither the Ninth Circuit nor the Bankruptcy Court could overrule the District Court's June 1995 ruling absent a timely and successful appeal.

This Court has previously described a "final decision" as one that "'end[s] the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Indeed, this Court has repeatedly held that a "'court lacks discretion to consider the merits of a case over which it is without jurisdiction.'" *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 203 (1988) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981)).

For more than a century this Court has consistently instructed lower federal courts that it is their affirmative duty to dismiss cases for which they lack subject matter jurisdiction. *See, e.g. Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849); *Mansfield v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). Accord Fed. R. Civ. P. 12(h) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")

Plaintiff standing is essential to a federal court's jurisdiction, *National Organization of Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994); *Heckler v. Matthews*, 465 U.S. 728, 737 (1984); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and an absence of standing requires dismissal. *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 715 (6th Cir. 1995) (if "a party does not have standing to bring an action, however, a court has no jurisdiction over the matter and an order of dismissal must be entered"); *Hope, Inc. v. County of DuPage Il*, 738 F.2d 797, 804 (7th Cir. 1984) (same). Accordingly, under traditional finality principles, an unappealed finding of lack of standing to bring suit should constitute a ruling which "'end[s] the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981) .

Most certainly, the Bankruptcy Court, on remand, could not have any greater subject matter jurisdiction than the District Court on appeal. A finding by the District Court on appeal that it lacked subject matter jurisdiction for lack of plaintiff standing is a finding binding upon a Bankruptcy Court upon remand, especially where, as here, the asserted basis for plaintiff standing (the October 7, 1992 Order) was the same before and after the District Court's ruling of no subject matter

jurisdiction. In this regard, a Bankruptcy Court is not free to reverse a District Court's ruling made pursuant to 28 U.S.C. § 158. *See, e.g. Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948) (lower court not free to ignore mandate of higher court).

Petitioners respectfully submit that this Court should grant plenary review of this case to determine and to clarify the finality principles applicable to remand orders issued by district courts acting pursuant to their appellate authority under 28 U.S.C. § 158(d). The application of uniform and clear principles is imperative in this area because it determines the presence of jurisdiction by all federal circuit courts, triggers a litigants' duty to perfect an appeal, and confers upon a prevailing party the right to rely upon the preclusive effects of an unappealed district court appellate ruling. For example, if the June 21, 1995 remand order of the District Court is final, Ohashi was obligated to perfect a timely appeal to obtain any reversal of the District Court's adverse standing ruling. If the District Court's remand ruling was a final and unappealed ruling, neither the Bankruptcy Court nor the Ninth Circuit could reverse this ruling. If finality applied to the June 23, 1995 District Court jurisdictional ruling, then the ensuing three layers and two years of federal litigation could have been avoided (the Bankruptcy Court proceedings on the merits on remand, the District Court reaffirmation of its prior jurisdictional ruling, and the subsequent appeal to the Ninth Circuit).

Absent application of some finality principles, a litigant prevailing in a statutorily-authorized bankruptcy appeal cannot rely upon the preclusive effect of district court appellate rulings on matters as fundamental as federal court jurisdiction. Moreover, denying finality to all district court bankruptcy remand orders will result in the anomalous situation found here--where a Circuit Court in effect reverses a prior

unappealed district court finding of no subject matter jurisdiction over an adversary action.

Both litigants and lower courts need clear guidance on the availability of circuit court review over district court rulings made under 28 U.S.C. § 158. Without such guidance, the preclusive character of district court rulings under § 158 is diminished, a consequence which can only increase the judicial burden on all levels of the federal judiciary.

CONCLUSION

For the foregoing reasons, we respectfully urge that the writ of certiorari be granted.

Respectfully submitted,

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Appendix

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[stamp—FILED; SEP 17 1997; CATHY A. CATTERSON, CLERK; U.S. COURT OF APPEALS]

* * * * * * * * * *

No. 96-55081
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

DUKE SALISBURY, Chapter 11 Trustee,
KENGO OHASHI,
Plaintiffs-Appellants,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

MEMORANDUM *

Argued and Submitted June 5, 1997
Decided Sept. 17, 1997.

Before BROWNING, FLETCHER and KOZINSKI, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I.

Because Duke Salisbury has been appointed trustee of the Ken Mizuno bankruptcy estate, Kengo Ohashi cannot appeal the district court's holding that Ohashi lacked standing to initiate the action for violation of the automatic stay *See Moneymaker v. Cohen (In re Eisen),* 31 F.3d 1447, 1451 n. 2 (9th Cir.1994). Accordingly, we dismiss Ohashi from the appeal and substitute Salisbury.[1]

II.

All assets and claims belonging to the estate passed to Salisbury when he was appointed trustee. *Id* He, alone, had authority to decide whether to prosecute this appeal. Upon deciding to do so, he was required to secure the consent of this court to appear in this action. *See Herndon v. Howard,* 76 U.S. 664, 665 (1869); *see also* 2 Lawrence P. King *Collier on Bankruptcy* § 323.02[3], at 323-9 (15th ed.1996). Salisbury has not filed a formal motion to substitute or intervene. However, we may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. *See* 11 U.S.C. § 105(a). The Bankruptcy Code gives Salisbury the authority to prosecute this appeal on behalf of the estate, *id.* § 323, and he has expressed a desire to do so. We treat Salisbury's notice of appeal as an implicit request to appear in this action and grant his request.[2]

III.

The district court erred in revisiting the issue of whether Ohashi lacked standing to initiate the action for violation of

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[1] We treat Ohashi as an amicus curiae.

[2] For this reason, we deny Mizuno's motion to dismiss Salisbury's appeal.

the automatic stay. Mizuno did not appeal the bankruptcy court's order, issued October 7, 1992, denying him relief because it found that Ohashi could act as the debtor. That order is final. *United States v. Ken Int'l Co.*, (No. 95-10225, 1997 WL 229114, at * (9th Cir. May 2, 1997). Mizuno concedes that if Ohashi could act as the debtor, he had standing to initiate the automatic stay action.

The collateral estoppel doctrine precludes Mizuno from relitigating this issue. *See North Bonneville v. Callaway,* 10 F.3d 1505, 1508 (9th Cir. 1993). Ohashi's standing to initiate the action was at stake in the October 7 order; the issue of Ohashi's standing was actually litigated in that final order; the determination of Ohashi's standing was a necessary and critical part of that final order. *Id.*

Salisbury is not precluded from litigating Ohashi's standing. The district court's remand order was not final and appealable, *see Starbuck v. City & Country of San Francisco,* 556 F.2d 450, 457 n. 13 (9th Cir.1977), and reconsidering Ohashi's standing was within the scope of the remand. *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1404 (9th Cir.1993). But because the bankruptcy court's October 7, 1992 order has preclusive effect on Mizuno with respect to this issue, Salisbury need not relitigate it. We hold that the bankruptcy court's final order is the law of the case and that Ohashi had standing to initiate the action for the automatic stay violation. Since we conclude that Ohashi had standing to initiate the suit, and Salisbury properly succeeds to Ohashi's interests, we find that Salisbury has standing to continue the automatic stay action.

IV.

The bankruptcy court did not err in holding Mizuno violated the automatic stay. We have held that "[a]ny property belonging to Mizuno became the property of the United

States Mizuno Bankruptcy Estate as of June 1992."[3] *Id.* at *2. The property of the bankruptcy estate includes the right to challenge the forfeiture of these pre-partition assets by filing a section 853(n) petition *See* 11 U.S.C. § 541(a). Mizuno violated the automatic stay by usurping this right of the estate. *See* 11 U.S.C. § 362(a)(3).

Mizuno argues that he did not violate the automatic stay because the estate abandoned its right to file the section 853(n) petition. However, the bankruptcy estate did not follow any of the procedures outlined in 11 U.S.C. § 554 for abandoning its property *See also In re Prospero,* 107 B.R. 732, 735 (Bankr.C.D.Cal.1989) (inaction by the bankruptcy trustee does not constitute abandonment).

We also reject Mizuno's claim that the automatic stay is inapplicable to a section 853(n) petition. Mizuno notes that the automatic stay does not bar "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b)(1). However, this court has held that a section 853(n) petition is civil in nature *United States v. Alcaraz-Garcia,* 79 F.3d 769, 772-73 n. 4 (9th Cir.1996).[4]

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[3] This court rejected Mizuno's argument that because the acts giving rise to the forfeiture occurred before the bankruptcy estate was created, the forfeited property never became part of the bankruptcy estate. *See Ken Int'l Co.,* 1997 WL 229114, at *2.

[4] Also without merit is Mizuno's argument that the bankruptcy court should not have granted partial summary judgment because Ohashi filed his motion for leave to amend and his summary judgment at the same time. The amended complaint clarified the grounds on which Ohashi sought recovery but did not introduce new factual allegations or legal theories. Mizuno does not claim that he was prejudiced by Ohashi's actions. Nor did he file a Rule 56(f) affidavit seeking leave to conduct further discovery to respond to the amended complaint.

Because the bankruptcy court did not err in finding Mizuno violated the automatic stay, and Mizuno has not shown that the bankruptcy court erred in awarding damages for this violation, we affirm both the bankruptcy court's finding of liability and its damage award.

V.

The district court did not err in implicitly denying Mizuno's motion to recuse Judge Riddle Mizuno lacks standing to appeal the denial of his motion because he can show no harm Mizuno asked the district court to recuse Judge Riddle only from the adversary proceeding. The district court's order remanding the adversary proceeding with instructions to dismiss it could not have injured Mizuno.[5] Accordingly, we grant Salisbury's motion to dismiss Mizuno's appeal.

Ohashi's appeals, Nos. 96-55077 and 96-55082, are DISMISSED. Mizuno's appeals, Nos. 96-55170 and 96-55173, are DISMISSED. The district court's order holding Ohashi lacked standing to initiate the automatic stay action is REVERSED. The bankruptcy court's holding that Mizuno violated the automatic stay and its damage award are AFFIRMED.

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[5] Even assuming Mizuno had standing to appeal the denial of his recusal motion, the district court did not err in denying the motion. Judge Riddle's impartiality cannot reasonably be questioned. *See* 28 U.S.C. § 455; *Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[stamp—FILED; SEP 29 1997; CATHY A. CATTERSON, CLERK; U.S. COURT OF APPEALS]

No. 96-55077
D.C. No. CV-95-00918-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE, a/k/a THE JAPANESE BANKRUPTCY ESTATE OK KEN MIZUNO,
Plaintiff-Appellant,

v.

KEN MIZUNO, DOMINIC P. GENTILE, TERRANCE G. REED,
Defendants-Appellees.

No. 96-55081
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

DUKE SALISBURY, Chapter 11 Trustee, KENGO OHASHI,
Plaintiffs-Appellants,

v.

KEN MIZUNO, DOMINIC P. GENTILE, TERRANCE G. REED,
Defendants-Appellees.

No. 96-55082
D.C. No. 95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

KENGO OHASHI, Administrator of the
JAPANESE BANKRUPTCY ESTATE OF
KEN MIZUNO,
Plaintiff-Appellant,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

No. 96-55170
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
DUKE SALISBURY, Chapter 11 Trustee;
KENGO OHASHI,
Plaintiffs-Appellees.

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

No. 55173
D.C. No. 95-00918-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
KENGO OHASHI,
Plaintiffs-Appellees,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellants.

Appeal from the United States District Court
for the Ninth Central District of California
Linda H. McLaughlin, District Judge, Presiding

Argued and Submitted June 5, 1997
Pasadena, California

ORDER AMENDING MEMORAMDUM DISPOSITION *

Before: BROWNING, FLETCHER and KOZINSKI, Circuit Judges

The Memorandum Disposition filed September 17, 1997 is amended as follows:

At page 7, in the third paragraph, the sentences beginning "The district court's order" and "The bankruptcy court's order" are amended to read: "Based on Salisbury's appeal, No. 96-55081, the district court's order holding Ohashi lacked standing to initiate the automatic stay action is REVERSED, and the bankruptcy court's holding that Mizuno violated the automatic stay and its damage award are AFFIRMED."

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. SA CV 95-917 LHM

BK SA 94-14429-LR
ADV SA 95-1043-LR

IN RE KEN MIZUNO, Debtor.

THE BANKRUPTCY ESTATE OF KEN MIZUNO,
Plaintiff,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED, AND DOES 1 through 20,
Defendants.

ORDER

[stamp—FILED; NOV 21 1995; CLERK, U.S DIRTRICT COURT; CENTRAL DISTRICT OF CALIFORNIA; SOUTHERN DIVISION AT SANTA ANA; /s/ JL, DEPUTY]

Based upon the reasons set forth in the Court's Minute Order dated 11/27/95, which is incorporated herein;

IT IS ORDERED that the Order of the Bankruptcy Court entered September 5, 1995 granting summary judgment against defendant Mizuno and partial summary judgment against defendants Gentile and Reed is reversed and the abovementioned action is remanded to the bankruptcy court with directions to dismiss the adversary complaint.

DATED: 11/27/95

LINDA H. McLAUGHLIN
United States District Judge

Case No. SA CV 95-917-LHM (EEx)

Title: In re Ken Mizuno

PRESENT:

HON. Linda H. McLaughlin, JUDGE
Debra Beard, Deputy Clerk

PROCEEDINGS: APPEAL OF ORDER GRANTING SUMMARY JUDGMENT

IN CHAMBERS:

The Court has read and considered the voluminous record in this case together with the parties' briefs on appeal and has undertaken independent research. The Court recognizes the Bankruptcy Judge's efforts in working diligently for an equitable solution to the problems presented. However, as discussed below, the structure of the United States bankruptcy laws must be applied to the functioning of a plenary bankruptcy proceeding in the United States.

(1) **This Appeal:** On January 11, 1995, Ohashi filed an adversary action purportedly on behalf of the Bankruptcy Estate of Ken Mizuno ("KM Estate") alleging that Mizuno, Gentile, and Reed had violated the automatic stay of the Bankruptcy Code by filing a petition for relief from forfeiture under 21 U.S.C. § 853 (n) in the criminal proceedings against Ken International Ltd. pending in the Nevada District Court. On March 10, 1995, the Bankruptcy Court granted the KM Estate's motion for summary judgment. Defendants appealed. By minute order issued on June 21, 1995, this Court reversed and remanded. The KM Estate then filed another motion for summary judgment. On September 5, 1995, the Bankruptcy Court granted the motion. Defendants Mizuno, Gentile, and Reed now appeal.

(2) **Standard of Review.** This Court reviews *de novo* a bankruptcy court's grant of summary judgment. *In re Kroy*

(Europe) Ltd., 27 F.3d 367, 368 (9th Cir. 1994). A bankruptcy court's legal conclusions are reviewed *de novo,* and its findings of fact are reviewed for clear error. *In re Siriani,* 967 F.2d 302, 303-04 (9th Cir. 1992).

(3) **United States Bankruptcy Laws Control.** On June 11, 1992, Ohashi filed an involuntary petition pursuant to § 303 (b)(4), which named "Ken Mizuno" as the debtor. "In a plenary case commenced pursuant to § 303 (b)(4), which named "Ken Mizuno" as the debtor. "In a plenary case commenced pursuant to § 303 (b)(4), United States bankruptcy law controls. . . ." *In re Axona International Credit & Commerce Limited,* 115 B.R. 442, 447 (S.D.N.Y. 1990). "The filing of an involuntary case by a foreign representative pursuant to § 303 (b)(4) initiates an independent U.S. bankruptcy case creating an estate within the meaning of § 541 of the Code. The foreign debtor is afforded the same treatment as a domestic debtor." *Matter of Axona International Credit & Commerce Limited,* 88 B.R. 597, 606 (S.D.N.Y. 1988). The point is that the United States bankruptcy laws determine how a bankruptcy is organized and conducted in the United States. Therefore, the parties involved in a bankruptcy must be lined up in compliance with the United States bankruptcy laws, i.e., the trustee, debtor, and debtor-in-possession must satisfy the requirements of the United States bankruptcy laws for trustees, debtors, and debtors-in-possession.

(4) **Trustee.** It is agreed that no trustee has ever been appointed for the KM Estate.

(5) **Mizuno is the debtor.** Mizuno was and is "the natural living breathing debtor in this case." *See* 9/5/95 Memorandum of Decision, 35. Moreover, Mizuno was named as debtor when Ohashi filed the involuntary petition.

(6) **Debtor in Possession.** Under 11 U.S.C. § 1101 (1), " 'debtor in possession' means debtor except when a person

that has qualified under section 322 of this title is serving as a trustee in the case." Where no trustee is appointed, there is no distinction between the debtor and the debtor in possession. *See Matter of Griseuk,* 165 B.R. 956, 958 (M.D.Fla. 1994) ("In a Chapter 11 case, the debtor and the debtor-in-possession are one and the same"); *In re Chapel Gate Apartments, Ltd.,* 64 B.R. 569, 576 (N.D.Tex. 1986) ("There is no debtor entity separate and apart from the debtor-in-possession"); *In re Babbitt Hardware & Lumber, Inc.,* 746 F.2d 1329, 1331 (8th Cir. 1984); *Matter of Triangle Chemicals, Inc.,* 697 F.2d 1280, 1290 (5th Cir. 1983).

(7) **Standing to Contest Violations of the Automatic Stay.** Generally, "[o]nly the debtor or the trustee has standing to bring claims for violation of the automatic stay." 6/21/95 Minute Order, 2 (citing *In re Pecan Groves of Arizona,* 951 F.2d 242, 245 (9th Cir. 1991) ("Language from many cases indicates that, if the trustee does not seek to enforce the protections of the automatic stay, no other party may challenge acts purportedly in violation of the automatic stay"); *In re Brooks,* 79 B.R. 479, 481 (Bankr. 9th Cir. 1987) ("if the debtor or the trustee chooses not to invoke the protections of § 362, no other party may attack any acts in violation of the automatic stay"); *In re Stivers,* 31 B.R. 735, 736 (Bankr. N.D.Cal. 1983) ("the automatic stay operates in favor of debtors and estates (represented by trustees and debtors-in-possession) only . . . .").

(8) **The Bankruptcy Court Did Not Have Authority to Replace a Debtor in Possession.** § 1107(a) says that a debtor in possession's rights and powers are "[s]ubject to . . . such limitations or conditions as the court prescribes." Taken alone, this section does not state that a debtor in possession's rights and powers may be transferred to someone other than the debtor.

§ 105(a) states, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). However, the Powers granted by § 105 may not be exercised in a way that is inconsistent with the provisions of the Bankruptcy Code. *See In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 n.4 (2d Cir. 1994); *Matter of Oxford Management, Inc.*, 4 F.3d 1329, 1134 (5th Cir. 1993).

The Bankruptcy Court cited *Matter of Gaslight Club, Inc.*, 782 F.2d 767 (7th Cir. 1986), for the proposition that it had the authority to supplant Mizuno with Ohashi as debtor in possession. However, as discussed below, *Gaslight Club* is so factually distinguishable that it is not persuasive authority.

In *Gaslight Club,* the president of a debtor corporation was designated by the court to exercise the rights and perform the obligations of the corporation as debtor in possession. *Id.*, at 768-69. After the president failed to meet a court deadline for the filing of a plan, an appointed committee of creditors requested an order designating another person to operate the corporation and to exercise its debtor in possession powers. *Id.*, at 769. The order was entered, ordering the person to "perform the duties imposed upon the debtors by the applicable provisions of the Bankruptcy Code." *Id.* The president was then discharged by his replacement, so he filed a motion to appoint a trustee or to vacate the order of appointment. *Id.*

In upholding the replacement of the person exercising the power of the debtor in possession, the Court in *Gaslight Club* stated, "Sections 105 (a) and 1107(a) of the Bankruptcy Code provide adequate authority for the bankruptcy court to approve the replacement of the person designated to perform the duties and exercise the rights of the debtor in possession if the creditors' committee, the person presently

in control and the majority and controlling shareholder of the debtor agree to this course of action." *Id.*, at 771. The Court continued, "[W]e think the peculiar circumstances of the case before us as well as the consent on all sides to the procedure followed make this case different." *Id.*, at 772.

Gaslight Club distinguished *In re Martin,* 26 B.R. 39 (Bankr. S.D.W.Va. 1982), in which the Court held, "Neither the facts of this case nor the law justifies creation of a new entity known as 'successor' to the debtor in possession." *Martin,* 26 B.R. at 39-40 ("The alternatives available under the Code include appointment of a trustee, appointment of an examiner, and conversion or dismissal of the case"). First, the Court in *Gaslight Club* explained, *In re Martin* did not present "a corporate situation involving corporate control." *Gaslight Club,* 782 F.2d at 773. Second, *in In re Martin,* "the person to be replaced (who was dead) did not join in the request for replacement." *Id.* Most important is the fact that in *Gaslight Club* "[t]he debtor in possession was, and remained, [the corporation]. The only issue was who was to exercise the rights of the debtor in possession, which, since it was a corporation, obviously needed to act through an individual." *Id.*; *see also* Bankruptcy Rule 9001(5).

In the present case, Mizuno is an individual, not a corporation, so the reasoning of *In re Martin* applies rather than the reasoning of *Gaslight Club.* In *Gaslight Club,* the debtor-in-possession, the corporation, remained the same; only the individual who could exercise the corporation's rights as debtor-in-possession had changed. Here, Mizuno, as an individual, acts on his own behalf and not through another individual. Thus, allowing Ohashi to replace Mizuno changes the debtor-in-possession entirely; and neither *In re Martin* nor *Gaslight Club* grants a bankruptcy court the power to appoint someone to replace an *individual* debtor in possession. The Bankruptcy Court's interpretation of these

cases runs contrary to the definition of "debtor in possession," (*see supra*), in the bankruptcy code.

(9) **Summary.** In sum, the United States bankruptcy laws control. To have standing to bring this adversary complaint, Ohashi must be the trustee, debtor, or debtor-in-possession of the KM Estate. Because Ohashi is neither the trustee, debtor, nor debtor-in-possession, he lacks standing.

(10) **Ruling.** The Bankruptcy Court's Order granting Summary Judgment for Plaintiff is REVERSED. The matter is REMANDED with directions to dismiss the adversary complaint for lack of Ohashi's standing to bring the adversary complaint.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. SA CV 95-337 LHM
NO. SA CV 95-367 LHM

BK SA 94-14429-LR
ADV SA 95-1043-LR

IN RE KEN MIZUNO, Debtor.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,

Appellants,

v.

BANKRUPTCY ESTATE OF KEN MIZUNO,

Appellee.

ORDER RE: REMAND

[stamp—FILED; NOV 21 1995; CLERK, U.S DIRTRICT COURT; CENTRAL DISTRICT OF CALIFORNIA; SOUTHERN DIVISION AT SANTA ANA; /s/ JL, DEPUTY]

Based upon the reasons set forth in the Court's Minute Order dated 6/21/95, which is incorporated herein;

IT IS ORDERED that the Orders of the Bankruptcy Court entered March 10, 1995 and March 24, 1995, granting summary judgment against Defendant Mizuno and partial summary judgment against Defendants Gentile and Reed, are reversed and the abovementioned action is remanded to the Bankruptcy Court.

DATED: 6/21/95

LINDA H. McLAUGHLIN
United States District Judge

CIVIL MINUTES

PRESENT:

HON. Linda H. McLaughlin, JUDGE

PROCEEDINGS:

(I) SUMMARY JUDGMENT APPEALS

IN CHAMBERS:

Based on the papers submitted by the parties and applicable law, pursuant to F.R. Civ. P. 78 and Local Rule 7.11, the Court now rules as follows:

I. SA CV 95-337 LHM/SA CV 95-367 LHM

(1) **Standard of Review.** The court reviews *de novo* a bankruptcy court's grant of summary judgment. *In re That's Entertainment marketing Group, Inc.,* 168 B. R. 226, 228-29 (N.D. Cal. 1994). Legal issues decided by the bankruptcy court are reviewed *de novo,* while factual findings are reviewed under the clearly erroneous standard. *In re Siriani,* 967 F. 2d 302 (9th Cir. 1992).

(2) **Standing.** Standing is a threshold issue that may be raised at any time. *National Org. of Women v. Scheidler,* 114 S. Ct. 798, 802 (1994).

(3) **Standing for Stay Violation.** The Court finds that Plaintiff lacked standing to bring the adversary action.

> (i) The Bankruptcy Code delegates to the trustee the capacity to sue and be sued, and similar functions to the debtor, absent a trustee. 11 U.S.C. § § 323, 1107 (a). Only the debtor or the trustee has standing to bring claims for violation of the automatic stay. *See In re Pecan Groves of Arizona,* 951 F.2d 242, 245 (9th Cir. 1991) ("Language from many cases indicates that, if the trustee does not seek to enforce the protection of the

automatic stay, no other party may challenge acts purportedly in violation of the automatic stay.''); *In re Brooks,* 79 B.R. 479, 481 (Bankr. 9th Cir. 1987) (''if the debtor or the trustee chooses not to invoke the protections of § 362, no other party may attack any acts in violation of the automatic stay''); *In re Stivers,* 31 B.R. 735, 735 (Bankr. N.D. Cal. 1983).

(ii) The record does not indicate that Ohashi was appointed trustee of the bankruptcy estate pursuant to 11 U.S.C. § § 321-323.

(iii) Ohashi is not the debtor. When Ohashi commenced the bankruptcy proceedings by means of involuntary petition, Ken Mizuno was of course identified as the debtor.

No judgment of the bankruptcy court in the record contains a determination that the ''Estate of Ken Mizuno,'' rather than Ken Mizuno, is the debtor in the underlying bankruptcy. Absent findings by the court, it cannot be said that the 7/10/92 and 10/7/92 orders denying motions to vacate the order of relief made such a determination.

Applying by analogy traditional rules of issue preclusion, when the content of a judgment is unclear, only those determinations necessary to support a judgment are considered decided. Because the abovementioned orders can be construed as determinations that the commencement of the bankruptcy proceedings was proper, the Court cannot say that they held Mizuno was not the debtor.

(4) **Standing for § 362 (h).** Under prevailing Ninth Circuit law, only natural persons are ''individuals'' with standing to bring claims for damages under 11 U.S.C. § 362 (h). *In re Goodman,* 991 F.2d 613, 619-20 (9th Cir. 1993).

Plaintiff, the estate of Ken Mizuno, is not a natural person. Therefore, Plaintiff lacked standing to assert the first count of its complaint.

(5) For the reasons discussed above, the bankruptcy court's grants of summary judgment against Defendant Mizuno and partial summary judgment against Defendants Gentile and Reed, by orders entered 3/10/95 and 3/24/95, are REVERSED and the abovementioned actions remanded.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[stamp—FILED; DEC 16 1997; CATHY A. CATTERSON, CLERK; U.S. COURT OF APPEALS]

* * * * * * * * * *

No. 96-55081
D.C. No. CV-95-00917-LHM

In re: KEN MIZUNO, Debtor.

KEN MIZUNO BANKRUPTCY ESTATE,
Plaintiff,

and

DUKE SALISBURY, Chapter 11 Trustee,
KENGO OHASHI,
Plaintiffs-Appellants,

v.

KEN MIZUNO, DOMINIC P. GENTILE,
TERRANCE G. REED,
Defendants-Appellees.

* * * * * * * * * *

Before: BROWNING, FLETCHER and KOZINSKI, Circuit Judges

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
APR 30 1998
OFFICE OF THE CLERK

No. 97-1497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KEN MIZUNO AND DOMINIC GENTILE,
Petitioners,

v.

DUKE SALISBURY, CHAPTER 11 TRUSTEE,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a remand for further factual findings on a jurisdictional issue precludes later litigation of that same jurisdictional issue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1497

KEN MIZUNO AND DOMINIC GENTILE,
Petitioners,

v.

DUKE SALISBURY, CHAPTER 11 TRUSTEE,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Duke Salisbury respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

I. Summary Of Argument

Petitioners Ken Mizuno and Dominic Gentile assert that this case turns on appellate finality. They are wrong. The simple question presented to this Court asks whether a party that heeds a district court's remand for further factual findings on a jurisdictional issue should be estopped from further litigation of that very same issue. Petitioners have failed to identify any split of authority or disagreement on the issue presented. Accordingly, the Petition should be denied.

II. Counterstatement Of Facts And Procedure

A. Facts

This case relates to one of the largest frauds ever perpetrated in the history of Japan. Between 1987-1990, Petitioner Ken Mizuno, individually and through various corporate entities, fraudulently oversold memberships to a golf country club in Japan. (Respondent's Appendix "Resp. App." at 3a, 12a.) While promising the prospective "members" that only 1,830 memberships would be sold, Mr. Mizuno sold over 52,000, netting him over $800 million in profits but leaving the victims with nothing but a piece of paper and a worthless "membership."[1] *Id.* at 3a-4a, 10a-12a.

From 1988 to 1991, Mr. Mizuno lived a grand lifestyle in Japan and abroad off the proceeds of his fraud, transferring in excess of $260 million into the United States alone. *Id.* at 4a, 12a. Mr. Mizuno, personally and through his wholly owned company Ken International Co., Ltd. ("KI"), spent lavishly in the United States purchasing, among other things, a Rolls-Royce Cornice, two golf courses, a $2 million-a-year personal golf "advisor," a DC-9 jet and the Beverly Hills mansion featured in the movie "Beverly Hills Cop 2." Mr. Mizuno also gambled extensively, paid the gambling debts of others, and transferred large sums of the fraudulent proceeds to friends and associates -- often in cash. *Id.*

In 1991, an investigative journalist in Japan revealed the true magnitude of the fraud. Immediately,

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[1] Had each "member" made a tee time to play at the Ibaraki Country Club, it would have taken many years to play even once.

Japanese authorities commenced parallel civil and criminal proceedings against Mr. Mizuno. *Id.* at 4a. The Japanese criminal proceedings ultimately resulted in Mr. Mizuno's conviction. The civil proceedings adjudicated Mr. Mizuno bankrupt as a result of his liability to his defrauded victims and placed Kengo Ohashi in charge of Mr. Mizuno's personal and business financial affairs.[2] *Id.* at 4a-5a, 13a. Mr. Ohashi effectively became the conservator of Mr. Mizuno's financial affairs.

Charged with gathering Mr. Mizuno's fraud proceeds and after obtaining express permission from the Japanese Court, Mr. Ohashi commenced separate bankruptcies in the United States on behalf of Mr. Mizuno personally and KI in an effort to obtain return of the fraud proceeds to the victims.[3] *Id.* at 5a, 14a. In 1992, before the United States Bankruptcy Court for the Central District of California, Mr. Mizuno challenged Mr. Ohashi's authority to initiate a bankruptcy case on his behalf. *Id.* Applying principles of comity, the bankruptcy court held that Japanese law vested Mr. Ohashi with control of Mr. Mizuno's personal financial affairs. *Id.* at 17a. As part of those affairs, the court held that Mr. Ohashi

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2 Petitioners assert that "under Japanese bankruptcy law, Mr. Ohashi's administrative authority was limited to property located in Japan." Petition at 1-2. This is an incorrect statement. Moreover, this issue was litigated and finally decided against Mr. Mizuno by the bankruptcy court in this matter.

3 The Japanese court had vested 100% control and ownership of the KI stock in Mr. Ohashi.

obtained the right to initiate a bankruptcy case. *Id.* That order is now final.[4]

Following the unsuccessful challenge to Mr. Ohashi's authority, Mr. Mizuno took no further action in the United States bankruptcy cases for over two years. *Id.* at 17a-18a. During that time, Mr. Ohashi administered both the Mizuno and KI bankruptcy estates in a normal manner. *Id.* Significant funds were returned to both estates through Mr. Ohashi's actions, including initiation of multiple adversary proceedings. *Id.* at 18a.

During that same time period, the United States Government began an investigation into the transfer of Mr. Mizuno's fraud proceeds into the United States through KI. *Id.* at 18a. This investigation ultimately resulted in federal charges of money laundering against both KI and Mr. Mizuno. *Id.* These charges carried with them the ability of the Government to seek forfeiture of all of the fraud proceeds to the United States Government and deny recovery to the victims. Seeking to preserve these funds for the benefit of the victims, Mr. Ohashi entered into discussions with the United States Department of Justice regarding the charges against KI. *Id.* As a result of these negotiations, and with the express permission of the Japanese court, the United States Bankruptcy Court and the United States District Court for the District of Nevada, Mr. Ohashi, as sole owner of KI, caused KI to plead guilty to the federal charges. *Id.* at 18a-19a. Under the terms of the Guilty Plea Memorandum

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[4] Mizuno attempted to appeal this decision over two years after entry. Both the district court and the United States Court of Appeals for the Ninth Circuit ruled it final and unreviewable.

("Memorandum"), certain defined KI assets in the United States were declared forfeit, certain expenses were deducted and 90% of the money was returned to Japan for distribution to the victims under the supervision of the Japanese courts.[5] *Id.* *See also United States v. Ken Int'l Co.*, 184 B.R. 102 (D. Nev. 1995).

Pursuant to the Memorandum and 21 U.S.C. § 853(n), on November 9, 1994, the Government gave notice of the proposed forfeiture requiring any party claiming an interest in the proceeds to come forward and file a petition asserting that interest. *Id.* at 19a. *See also* 21 U.S.C. § 853(n). Nearly a month later, Mr. Mizuno, by and through his attorney, Petitioner Dominic Gentile, filed a petition claiming personal ownership in seven pieces of property subject to forfeiture. Despite knowing full well of the pendency of the bankruptcy cases in California, Mr. Mizuno made no mention of the bankruptcy case in his petition and attempted to gain personal control over certain assets. *Id.* at 19a.

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5 Petitioners assert that the forfeited assets "were ultimately transferred by Ohashi to another Japanese corporate bankruptcy estate." Pet. at 3. This is not true. Under the direct supervision of the Japanese court, the United States Government returned the money to a corporation that merely acted as a conduit for the return of the funds to the victims.

B. Procedural History

1. The First Proceeding Before The Bankruptcy Court

It is well settled that upon commencement of a bankruptcy, "[a]ny interest the debtor has in property, no matter how insignificant, constitutes property of the estate." *In re Alcom Am. Corp.*, 154 B.R. 97, 103 (Bankr. D.D.C.), *vacated in part by*, 156 B.R. 873 (Bankr. D.D.C. 1993). Section 362 of the Bankruptcy Code prohibits and enjoins "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). By attempting to assert an individual proprietary interest in the forfeit proceeds (as well as filing the petition itself), Mr. Mizuno had interfered with property of his personal bankruptcy estate which Mr. Ohashi administered. Accordingly, Mr. Ohashi initiated an adversary proceeding against Petitioners for violation of the stay. Mr. Ohashi subsequently sought summary judgment.

Petitioners argued, *inter alia,* that Mr. Ohashi was not properly in control of the bankruptcy estate and, therefore, could not initiate the adversary proceeding. The bankruptcy court disagreed and, in an oral ruling followed by a brief order, entered summary judgment for Mr. Ohashi. Resp. App. at 7a. Petitioners appealed.

2. The First District Court Order

The district court reversed, largely on what it perceived to be an incomplete factual record that was

insufficient to establish that Mr. Ohashi could exercise the powers of the estate ("First Order"). The district court ruled as follows:

> (ii) The *record does not indicate* that Ohashi was appointed trustee of the bankruptcy estate pursuant to 11 U.S.C. §§ 321-323.
>
> No judgment of the Bankruptcy Court *in the record* contains a determination that the "Estate of Ken Mizuno," rather than Ken Mizuno, is the debtor in the underlying bankruptcy. *Absent findings by the court*, it cannot be said that the 7/10/92 and 10/7/92 orders denying motions to vacate the order for relief made such a determination.
>
> Applying by analogy traditional rules of issue preclusion, *when the content of a judgment is unclear*, only those determinations necessary to support a judgment are considered decided. Because the above mentioned orders can be construed as determinations that the commencement of the bankruptcy proceeding was proper, the court cannot say that they held Mr. Mizuno was not the debtor. . . .
>
> (5) *For the reasons discussed above*, the bankruptcy court's grants of summary judgment against Defendant Mizuno and partial summary judgment against Defendants Gentile and Reed, by orders entered 3/10/95 and 3/24/95, are REVERSED *and the above mentioned actions remanded.*

Pet. App. 17a-18a (emphasis added).[6] The First Order was explicit: the record on appeal was insufficient, in the district court's estimation, to conclude that Mr. Ohashi had standing. Accordingly, Mr. Ohashi returned to the bankruptcy court to seek determination of Mr. Ohashi's status -- the very act directed by the district court.

3. The Remand Proceeding Before The Bankruptcy Court

Mr. Ohashi amended the bankruptcy estate's complaint to clarify the basis for relief and sought summary judgment again before the bankruptcy court. Petitioners did not immediately oppose the motion. Rather, they instead returned to the district court and filed a motion seeking "clarification" of the First Order. In that request, Petitioners informed the district court of the further proceedings before the bankruptcy court and requested the district court's intervention in the form of an order terminating proceedings before the bankruptcy court. The district court declined, stating simply that the "order speaks for itself, and requires no further clarification."

Apparently unsatisfied with that result, Petitioners filed a second motion to withdraw the reference from the bankruptcy court. Again, the district court

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6 Notably, in the same order, the district court refused to withdraw the reference from the bankruptcy court. Had the district court's First Order conclusively resolved the standing issue as Petitioners now claim, it hardly seems appropriate for the district court to refuse to withdraw the reference and then remand the action.

declined and even commented on the theories of the amended complaint. In short, it is quite clear that the district court believed that it was remanding for further proceedings before the bankruptcy court and was satisfied that such proceedings were occurring.

After full briefing and submissions on the second motion for summary judgment, the bankruptcy court issued an unpublished eighty-six page opinion, replete with factual findings and legal conclusions regarding Mr. Ohashi's status. The bankruptcy court succinctly dealt with Mr. Mizuno's contention that the First Order had finally resolved the litigation: "I cannot agree with the fundamental premise of defendants' argument that [the First Order] conclusively determined the standing issue." Resp. App. at 38a. "[The district court] specifically denied defendants' request to amend the remand order to provide that this court may only take action to dismiss the adversary proceeding. The district court did so knowing that plaintiff had refiled the instant summary judgment motion. I interpret this to mean that the district court did not determine that plaintiff's standing was a legal impossibility." *Id.*

4. The Appeal To The District Court

Petitioners again appealed. They advanced two principal arguments. First, they contended that the First Order conclusively resolved the litigation and, therefore, the district court should not hear the matter at all. Second, Petitioners argued that the factual findings by the bankruptcy court were insufficient to confer standing. Consistent with its remand for further factual development in the First Order, in an unpublished minute order, the district court declined to rule that the issue had been conclusively addressed in

the First Order. The district court reversed on the merits, however, holding that even under the factual record presented, Mr. Ohashi lacked the power to initiate the proceedings at issue. Pet. App. at 15a. The district court remanded again, this time *with directions* to dismiss the action. *Id.*

5. Proceedings Before The Court Of Appeals

Mr. Ohashi timely appealed to the United States Court of Appeals for the Ninth Circuit.[7] Pet. App. at 1a-5a. Before the Ninth Circuit, Petitioners resurrected the same argument that had been rejected by both the district court and the bankruptcy court, namely that the First Order was intended to and did conclusively resolve the issue of Mr. Ohashi's standing and that Mr. Ohashi was estopped from returning to the bankruptcy court and developing the factual record. In an unpublished memorandum opinion, the Ninth Circuit held that the First Order did not bar further litigation of the issue of standing.[8] Pet. App. 3a. The Ninth Circuit also concluded that the bankruptcy court properly determined that Mr. Ohashi *did* have standing to initiate the adversary proceeding and, therefore, reversed the district court's order and reinstated the judgment of the bankruptcy court. Pet. App. at 5a.

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7 In light of the district court's order, Mr. Ohashi petitioned the bankruptcy court for appointment of a trustee. On December 15, 1995, the bankruptcy court granted the request and appointed Duke Salisbury as trustee. Mr. Salisbury also filed a timely notice of appeal.

8 The Ninth Circuit also held that Mr. Salisbury was the proper party to the appeal. Pet. App. at 2a.

The Petition followed.

REASONS FOR DENYING THE WRIT

I. Review Is Not Warranted Because The Decision Below Does Not Present The Conflict Identified By Petitioners

Contrary to Petitioners' claim, this case does not turn on appellate finality -- it turns, if at all, on the doctrine of collateral estoppel.[9] The facts are quite clear -- the district court desired further factual findings and record support regarding the issue of standing, and Mr. Ohashi followed the district court's direction and obtained that factual record. Petitioners

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9 Before the Ninth Circuit, Petitioners argued that the First Order precluded the remand under the doctrines of collateral estoppel (issue preclusion), *res judicata* (claim preclusion), law of the case and the rule of mandate. In the Petition, Petitioners now refer to *res judicata*. In essence, plaintiffs claim that the First Order completely and fully litigated the issue of Mr. Ohashi's standing with nothing left to consider. Where a party contends that an issue has been fully and fairly litigated thus precluding further consideration, the doctrine of issue preclusion is invoked. Claim preclusion is properly considered where the party argues that the issue could have been raised in prior litigation between the same parties over the same facts but was not and, therefore, it is barred. *See, e.g., Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). Because this matter involves the same litigation and the same subject, the proper doctrine is actually law of the case which addresses the situation where later proceedings in the same case arguably diverge from earlier rulings. Between issue and claim preclusion, however, issue preclusion is arguably more on point.

now claim that the First Order should be interpreted in a manner inconsistent with the manner in which the district court, bankruptcy court and Ninth Circuit have all interpreted it. The real issue before this Court is whether the First Order should be given an effect never intended by the district court, thereby prejudicing the estate for expressly adhering to its dictates. Whatever the resolution of that issue on the merits (and Respondent would suggest the answer should be no), it is clear that the issue being litigated is the collateral effects of the First Order, not appellate jurisdiction, and, therefore, Petitioners' invocation of the "unsettled" nature of questions of appellate jurisdiction over district court orders reversing bankruptcy court orders is not squarely presented.

While couching it in different terms, in essence, Petitioners seek to invoke "issue preclusion" or "collateral estoppel" based upon Mr. Ohashi's adherence to the remand. "[A] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1979) (citation omitted). The purpose of precluding relitigation of identical issues is the promotion of judicial economy and giving effect to judgments where no further proceedings are contemplated. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Notably, however, issue preclusion is an equitable doctrine "applied only when the alignment of the parties and the legal and factual issues raised warrant it." *Copeland v. Merrill Lynch & Co., Inc.* 47 F.3d 1415, 1423 (5th Cir. 1995) (citation omitted).

"'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness

of procedures followed in prior litigation.'" *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) (quoting *Montana v. United States,* 440 U.S. at 164 n.11). Based on this requirement that the prior litigation has conclusively addressed the issue, some courts have noted that the prior determination must be "final" but that term has been held not to be coextensive with the term "final," as it is used for appellate purposes. *See, e.g., John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 563 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991). Rather, the availability of appeal is but "one factor to consider" in determining whether the previous litigation of the issue was sufficient to accord preclusive effect. *Id.* Indeed, finality in the context of issue preclusion "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962).

Petitioners assert that "the finality of the District Court's June 21, 1995 remand order for lack of subject matter jurisdiction is a dispositive issue." Pet. at 9. This is not true. Indeed, the "finality" in issue is not the notion of appellate finality but rather the finality necessary to estop further litigation of that particular issue. The "split" of the circuits to which plaintiffs refer regards appellate finality. While the issues inform one another, they are not identical.

Here, the district court clearly evidenced an intent to receive further factual information on the issue of standing. Appellate courts are well within their rights to remand to bankruptcy courts for further proceedings designed to make jurisdictional determinations and those remands do not preclude further determination of

the jurisdictional issues. *See United Elec. Radio Workers v. 163 Pheasant Street Corp.*, 987 F.2d 39, 47 n.16 (1st Cir. 1993) (noting that determination in first appeal that court lacked personal jurisdiction was simply "an assessment of the record *as it stood when the original motion to dismiss was filed.*") (emphasis in original).

Here, there is no question that the district court did not intend to end the litigation. First, after an opinion that pointedly refers to multiple factual deficiencies, the district court remanded without the direction to dismiss. Second, the district court refused to withdraw the reference from the bankruptcy court. Third, when specifically informed of further proceedings before the bankruptcy court following entry of the First Order, the district court refused to enter an order that would halt those proceedings. Fourth, the district court declined a second request to withdraw the reference and commented upon the active proceedings before the bankruptcy court. Finally, in its second opinion, the district court declined Petitioners' argument to simply reverse based upon collateral estoppel or law of the case. Only upon consideration of the record as it existed upon the second appeal did the district court conclude that Mr. Ohashi lacked standing as a matter of law.

The dichotomy between the record on the first appeal and the second appeal presents (and ultimately precludes) application of the doctrine of collateral estoppel. Rejecting a similar argument in the jurisdictional context, the court in *United Elec. Radio Workers* stated "the incomplete nature of the record prevented any sort of conclusive determination on the personal jurisdiction issue at the time [the preceding opinion] was handed down. The jurisdictional deficiency which informed the holding in our previous

opinion did not stem from either a settled factual predicate or legally insufficient allegations, but from perceived voids in the evidentiary landscape." *Id.* at 47. Here too, this case is an example of a district court observing "voids in the evidentiary landscape" and remanding for rectification. Appellate finality may inform, but does not decide, whether such an order is binding or the effect of such an order. It would work an extreme injustice to penalize the estate for providing the district court with the record it sought and would constitute an inequitable application of an equitable and discretionary doctrine.

While the issue was not directly presented, the same procedural scenario occurred before this Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). In *Pioneer Investment*, the bankruptcy court deemed the filing of a claim against an estate late and the "excusable neglect" standard not met. *Id.* at 384-85. The district court disagreed concluding that the proper rule would follow "a more liberal approach" to the "excusable neglect" standard. *Id.* at 385. The district court remanded for further consideration of the issue. The litigants returned to the bankruptcy court whereupon they continued to litigate the nature of the reasons behind the late filing. The bankruptcy court again concluded that the late claim would not be accepted and the district court affirmed. The court of appeals reversed and this Court accepted certiorari and affirmed, thus establishing the standard by which "excusable neglect" would be adjudicated. While *Pioneer Investment* did not directly consider the issue of claim or issue preclusion, it demonstrates the benefits of heeding the district court remand. It further presented a situation where the district court considered the same legal issue twice, once after a remand for further factual findings. In that case, the parties were able to establish a factual

record under which the conduct would be adjudicated. No court ruled that the first district court order precluded further litigation of the standard simply because the parties heeded the remand. Nor should the Court here.

Petitioners rely predominantly on this Court's decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). That case presented issues significantly different from those posed by this action. In *Federated Department Stores*, the plaintiffs lost before the trial court. A number of the plaintiffs appealed but some did not. The plaintiffs that did appeal prevailed before the Ninth Circuit. The plaintiffs that had elected not to appeal attempted to file a new action after the appeal had been resolved favorably. The defendant argued that the prior disposition was *res judicata* against those who did not appeal and that the claim had been precluded by the former final and unappealed decision. This Court ultimately agreed. Noting that the parties who had failed to appeal "seek to be the windfall beneficiaries of an appellate reversal procured by other independent parties," this Court held that where a party "made a calculated choice to forgo their appeals," they could not later revive their case through the fortuitous event occasioned by the acts of a third party. *Id.* at 400-01.

Federated Department Stores differs from this matter in many respects. Far from attempting to gain the windfall of a fortuitous event after having ceased litigation, the estate simply heeded the instructions of the district court to provide the record necessary to make a conclusive determination with respect to standing. Moreover, *Federated Department Stores* involved claim preclusion, a related but distinct doctrine from the issue preclusion at stake here. Additionally, in *Federated Department Stores* the

second action was a later filed complaint. Here, the estate continued to litigate the same action before the same courts to the prejudice of no one. None of the factors that motivated this Court's decision in *Federated Department Stores* are present here.

II. Review Is Not Warranted Because Petitioners Have Not Identified A Split Of Authority Over The Issue At Stake

Even assuming that appellate finality is at issue, and for the reasons discussed above it is not, none of the cases cited by Petitioners establish the purported "split" in authority under the unique facts presented by this case. The cases cited by petitioner are circuit court decisions deciding whether appellate jurisdiction lies for review of a district court order remanding a bankruptcy court decision. In *each* case, the court of appeals considers whether jurisdiction lies. In the case at bar, there is no appellate jurisdictional question presented. At the very most, the court of appeals considered whether the discretionary doctrine of collateral estoppel should bar reconsideration of the issue of standing. Thus, because the matter stands in a procedural posture different from the purported "split" identified by Petitioners, review is inappropriate.

Moreover, none of these cases presented a situation like that at bar where the district court remands for further factual development *of the issue before it*. It may present an interesting question whether a decision on a point of law and remand for further proceedings in the case is "final" for appellate purposes where that issue would not be reconsidered, but here the district court essentially held that it could not decide the question before it on the record submitted. In other words, the remand was not for the purpose of further proceedings on separate and distinct issues but rather

for further proceedings *on the very issue presented in the first appeal* -- the same procedure followed in *Pioneer Investment.*

III. Review Is Not Warranted Because The Authorities Cited By Petitioner Would All Yield The Same Result

As stated above, appellate finality is not the dispositive issue in this case. Even if it were, however, resolution of the purported "split" in authorities would not alter the outcome of this matter.

As Petitioners correctly recognize, a "split" among the circuits exists as to when a court of appeals has jurisdiction to entertain an appeal from a district court order reversing and remanding a bankruptcy court order for further proceedings. The majority rule, announced by the United States Court of Appeals for the Seventh Circuit, holds that even if the bankruptcy court order is final, a district court order reversing and remanding for further significant proceedings, such as fact finding on the central issue of the appeal, is not final for appellate purposes. *See Suburban Bank of Cary Grove v. Riggsby (In re Riggsby)*, 745 F.2d 1153 (7th Cir. 1984). That rule has been repeated by the Seventh Circuit, *see, e.g., In re Lopez*, 116 F.3d 1191 (7th Cir.), *cert. denied,* 118 S. Ct. 599 (1997), and followed by most circuits. *See, e.g., Estancias La Ponderosa Dev. Corp. v. Harrington (In re Harrington)*, 992 F.2d 3 (1st Cir. 1993); *LTV Corp. v. Farragher (In re Chateaugay Corp.),* 838 F.2d 59 (2d Cir. 1988); *United States v. Carolina Parachute Corp.*, 907 F.2d 1469, 1472 n.3 (4th Cir. 1990); *Aegis Specialty Mktg., Inc. v. Ferlita, (In re Aegis Specialty Marketing, Inc.)*, 68 F.3d 919, 921 (5th Cir. 1995); *Broken Bow Ranch, Inc. v. Farmers Home Admin.(In re Broken Bow Ranch, Inc.)*, 33 F.3d 1005, 1008 (8th

Cir. 1994); *Masunaga v. Stoltenberg (In re Rex Montis Silver Co.)*, 87 F.3d 435, 438 (10th Cir. 1996); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1548 (11th Cir. 1996); *In re St. Charles Preservation Investors, Ltd.*, 916 F.2d 727 (D.C. Cir. 1990) (per curiam). Three circuits follow a more lenient rule. In the Third, Ninth and arguably Sixth Circuits, the courts have held that other considerations such as judicial economy and expedition may make otherwise non-final orders final and amenable to appellate review. *See, e.g., Hammond v. Commonwealth Mortgage Corp. of America (In re Hammond)*, 27 F.3d 52, 55 n.5 (3d Cir. 1994); *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506-07 (9th Cir. 1995); *Breyfogle v. Grange Mut. Cas. Co. (In re Gardner)*, 810 F.2d 87, 92 (6th Cir. 1987); *but see Miller's Cove Energy Co., Inc. v. Moore (In re Miller's Cove Energy Co.)*, 128 F.3d 449, 451 (6th Cir. 1997) (questioning viability of *Gardner* and dismissing appeal where certification under Rule 54(b) had not been sought).

Petitioners do not dispute that the majority rule would find the First Order incapable of preclusive effects -- the district court clearly contemplated further significant proceedings before the bankruptcy court. What Petitioners ignore, however, is that the Ninth Circuit -- the appellate court in this matter -- subscribes to the *minority* position. Before the Ninth Circuit, Respondent (and Mr. Ohashi as amicus) addressed the "finality" of the order under the more lenient, judicial efficiency test adopted by the minority of Circuits. Nevertheless, the Ninth Circuit concluded that the First Order was not final even under that more lenient standard. [cite] Thus, this case does not present an opportunity to resolve the conflict among the circuits, because the result would be the same under either approach. In reality, Petitioners seek review of the question whether the court of appeal correctly applied

its lenient test for appealability on the particular fact of this case, but that fact-bound question is not worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 30, 1998.

UNITED STATES BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re KEN MIZUNO, Debtor.	CASE NO. SA94-14429LR CHAPTER 11 Adv. No. AD95-01043
THE BANKRUPTCY ESTATE OF KEN MIZUNO, Plaintiff, v. KEN MIZUNO, DOMINIC P. GENTILE, and TERRANCE G. REED, Defendants.	ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, IN PART, AGAINST DEFENDANTS MIZUNO, GENTILE AND REED HEARING DATE: August 18, 1995 10:00 a.m. Courtroom 520

Plaintiff, The Bankruptcy Estate of Ken Mizuno, brought on for hearing its Motion for Summary Judgment before the undersigned United States Bankruptcy Judge at 10:00 A.M. on August 18, 1995. Craig H. Millet, Esq. of Gibson, Dunn & Crutcher, appeared for the moving party. Dominic P. Gentile, Esq. appeared for defendant Ken Mizuno; Herbert N. Nierman, Esq. appeared for defendants Dominic P. Gentile and Terrance G. Reed; Arnold M. Quittner, Esq. of Strook, Strook & Lavan, also appeared.

Having briefly taken the matter under submission, and following a review of the moving and responding papers, the arguments at hearing, and the file and records in this proceeding, the Court has

issued, and files concurrently herewith, a complete Memorandum of Decision.

Based on the findings of fact and conclusions of law as set forth in the Memorandum of Decision, the Court makes the following order:

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's motion for summary judgment on its first claim for relief against all defendants is GRANTED;

IT IS FURTHER ORDERED that since plaintiff has met its burden of proof to establish that defendants Mizuno and Gentile willfully violated the automatic stay and that they are liable for damages, summary judgment on the second claim for relief against defendants Mizuno and Gentile is GRANTED;

IT IS FURTHER ORDERED that a separate judgment will be issued and entered against defendants Mizuno and Gentile, jointly and severally, in the amount of $285,687.75 in fees and $ 21,922.82 in costs;

IT IS FURTHER ORDERED that plaintiff has not carried its burden to show that defendant Reed's actions were willful. Therefore, plaintiff's motion for summary judgment against defendant Reed on the second claim for relief is DENIED; and

FINALLY, IT IS ORDERED that summary judgment as to the third claim for relief is GRANTED as to all defendants. An injunction shall issue forthwith prohibiting defendants from further violating the automatic stay.

Dated: Sep - 5 1995

Lynne Riddle
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re KEN MIZUNO, Debtor.	CASE NO. SA94-14429LR CHAPTER 11 Adv. No. AD95-01043
THE BANKRUPTCY ESTATE OF KEN MIZUNO, Plaintiff, v. KEN MIZUNO, DOMINIC P. GENTILE, and TERRANCE G. REED, Defendants.	**MEMORANDUM OF DECISION** GRANTING, IN PART, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT **HEARING DATE:** August 18, 1995 10:00 a.m.

BACKGROUND FACTS

Ken Mizuno is a Japanese citizen who, between 1987 and 1990, engaged in a scheme to defraud Japanese investors of over ¥ 50 billion (approximately $800 million). Mizuno, through his company Hitachi Kanko Kaihatsu ("HKK") and a related entity, Sanki, sold memberships in a country club known as the Ibaraki Country Club in Japan. The memberships were offered at ¥ 2 million to ¥ 3 million (approximately $30,000 - a bargain by Japanese standards) in order to generate quick sales. Mizuno

represented to the purchasers that only 1,830 memberships would be sold. However, he at all times intended to sell more than 20,000, and wound up selling more than 52,000 memberships. Mizuno knew at all relevant times that the memberships were to be oversold. He knew that the overselling would make it impossible for the purchasers to use the club as promised and as a result, the $30,000 memberships were essentially worthless.

Between March 1989 and July 1991, Mizuno, through the use of Ken International Co., Ltd., his wholly owned corporation, made 47 separate electronic wire fund transfers into the United States. It is estimated that Mizuno accomplished total transfers in excess of $260 million into various United States banks. These funds were directly traceable to Mizuno's illegal activities in Japan. Upon arrival in the United States, the illegally obtained proceeds were transferred into the names of friends and associates of Mizuno, as well as trusts controlled by him. A portion of the proceeds were used to acquire properties in the United States, including several country clubs in Nevada, California, and Hawaii. The disposition of a significant portion of the secreted assets remains unknown.

In July 1991, the purchasers of the Ibaraki Country Club memberships discovered Mizuno's fraud after the Japanese magazine Shincho published an article exposing the fraud scheme. In October 1991, the Ibaraki members/investors filed involuntary bankruptcy petitions against Mizuno and Ken International Co., Ltd., in the Tokyo District Court, 20th Division. On April 28, 1992, the Tokyo District Court found Mizuno and Ken International liable to the investors and adjudicated them bankrupt. By order of the Japanese Court Kengo Ohashi was appointed administrator of the Japanese Bankruptcy Estate of Ken Mizuno. The Japanese Court also appointed Mr. Ohashi the administrator of the Japanese Bankruptcy Estate of Ken International Co., Ltd. On June 11, 1992, the Tokyo District Court issued a

"permission" instructing Ohashi to collect Mizuno's and Ken International's U.S. assets.

On June 19, 1992, Kengo Ohashi filed involuntary petitions pursuant to 11 U.S.C. § 303 against Ken Mizuno and Ken International Co., Ltd. in the United States Bankruptcy Court for the Central District of California, San Bernardino Division.[1] That same day, Kengo Ohashi filed documents with the court purporting to waive answer and consenting to the entry of orders for relief in each case. Based thereon, orders for relief were entered on June 19, 1992 in both cases. Kengo Ohashi has acted as the debtor in possession of both estates since that date.[2]

During the summer of 1992 Ken Mizuno brought three motions to vacate the entry of the order for relief entered in his case. However, for certain procedural reasons, the merits of the motion to vacate were not reached until the third motion which was heard on August 24, 1992. By order entered October 7, 1992, that motion was denied.

Subsequently, the United States government filed a criminal information against Ken International Co., Ltd. charging it with the foreign transportation of the proceeds of fraud, money laundering, and criminal forfeiture. Ken International Co., Ltd., through Kengo Ohashi, pled guilty to the acts alleged in the information and entered into a plea agreement through which it agreed to forfeit Ken International's assets in

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1 By order entered May 2, 1994, the case of Ken Mizuno was transferred to the Santa Ana Division and assigned a new case number.

2 This Memorandum of Decision is followed by an Addendum which provides additional background information regarding some of the unique issues raised and determined in these proceedings.

exchange for the government's agreement to return a significant portion of those assets to the Japanese fraud victims. This plea agreement was approved by this court on September 22, 1993. It was also approved by the Tokyo District Court. However, notice was not given to Ken Mizuno in either proceeding. The order of forfeiture pursuant to Ken International's plea agreement was entered by the United States District Court for the District of Nevada on October 27, 1993.

As a condition to entering a final order of forfeiture, the United States gave notice to Ken Mizuno of the plea agreement on November 9, 1994. That notice informed him that if he claimed an interest in the property superior to that of Ken International, he may file a petition to be relieved of the order of forfeiture pursuant to 21 U.S.C. § 853(n). On December 6, 1994, Ken Mizuno, through his attorneys Terrance G. Reed and Dominic P. Gentile, filed a petition seeking vacation of the October 27, 1993 forfeiture order. The petition alleged that various of Mizuno's constitutional rights had been violated. Among other things, Mizuno claimed that the plea agreement violated his due process rights because it caused a forfeiture of his property without requiring the government to prove that he, individually, had committed any crime beyond a reasonable doubt and because he had no opportunity to be heard in the forfeiture action. Mizuno also claimed that the plea agreement denied his right to a jury trial on the forfeiture count, and that it violated his Eight Amendment rights by imposing an "excessive" forfeiture. Alternatively, the petition alleged that he was entitled to recover (for himself) certain specific items of property because he qualified for relief from the forfeiture order under 21 U.S.C. § 853(n).

On January 11, 1995, the estate of Ken Mizuno filed this adversary proceeding against Mizuno, Reed, and Gentile. As originally filed, claim one of the complaint alleged that Mizuno's filing of the relief from forfeiture petition constituted a willful violation of the stay and sought damages pursuant to § 362(h) of

the Bankruptcy Code.[3] Claim two sought damages under 11 U.S.C. § 105 for contempt of the automatic stay, and the third claim sought an injunction preventing defendants from further asserting control over property belonging to the estate.

On March 10, 1995, this court entered an order granting summary judgment in favor of plaintiff and against defendant Mizuno finding that he willfully violated the automatic stay by filing his relief from forfeiture petition in the Nevada District Court. At that time, plaintiff declined to seek monetary damages against Mizuno. On March 24, 1995, this court entered partial summary judgment against defendants Reed and Gentile, finding that they had violated the automatic stay by assisting Mizuno in filing his relief from forfeiture petition and enjoining Mizuno, Reed and Gentile from further asserting control over estate property. However, the record contained insufficient evidence to prove that Reed and Gentile had knowledge of the stay prior to December 6, 1994 and hence, the court could not find that they had willfully violated the stay or that they were liable for damages.

Defendants appealed the grant of summary judgment against Mizuno to the United States District Court. Defendants Reed and Gentile were granted leave to file an interlocutory appeal of the order

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[3] From the outset of this adversary proceeding, I read claim one as being declaratory in nature, seeking a determination that defendants' actions constituted an act to exercise control over property of the estate, and that the stay had been violated as a result. *See* Plaintiff's Complaint filed January 11, 1995, at page 8 ln. 20 - 27, page 9 ln. 1 - 13, and page 11, ln. 4 - 6. However, I am bound by the District Court's characterization that claim one stated a claim for damages under § 362(h). *See* Part I.(4) to Judge McLaughlin's June 23, 1995 order.

granting partial summary judgment against them to the District Court as well. On June 23, 1995, Judge Linda H. McLaughlin REVERSED and REMANDED this court's March 10 and March 24, 1995 orders. In part I.(3) of that order, Judge McLaughlin relied on In re Pecan Groves of Arizona, 951 F.2d 242, 245 (9th Cir. 1991), in holding that only a trustee or debtor in possession may prosecute actions for stay violations. On the record before her, Judge McLaughlin found that she could not conclude that plaintiff was either a trustee or debtor in possession. In addition, relying on In re Goodman, 991 F.2d 613 (9th Cir. 1993), Judge McLaughlin held that only natural persons are entitled to seek damages under § 362(h), and that because the Bankruptcy Estate of Ken Mizuno was not a natural person, it had no standing to seek damages under that provision. Consequently, she determined that there was no record basis to conclude that plaintiff has standing to bring this action.

On June 29, 1995, just days after this case had been remanded back to this court, plaintiff filed a motion to amend its complaint to make it clear that its first claim, claim one, did not seek damages under § 362(h). Plaintiff also refiled the instant summary judgment motion seeking to have this court make express findings as to the basis for plaintiff's authority to prosecute actions on behalf of the estate, and seeking: an adjudication that defendants' actions violated the stay, that plaintiff was entitled to an injunction precluding further interference and that defendants be held liable for damages. Defendants responded by petitioning for a rehearing in the District Court. Among other things, defendants asked Judge McLaughlin to clarify the scope of this court's authority and powers post-remand. Defendants' NOTICE OF MOTION AND MOTION FOR REHEARING, page 8, ln. 26 – 28. Defendants specifically informed the District Court that plaintiff had refiled its summary judgment motion in this court. MOTION FOR REHEARING, page 9, ln. 8 – 13. Defendants contended that the June 23 order required remand solely for the purposes of dismissal based on Judge McLaughlin's

holding that plaintiff lacked standing. On July 6, 1995, Judge McLaughlin denied defendants' motion for a rehearing stating that her prior order was sufficiently clear. Because Judge McLaughlin could have dismissed this complaint outright in her June 23 order if she believed plaintiff could under no circumstances have standing to prosecute this alleged stay violation, and because she declined to limit the mandate on remand knowing that plaintiff contemplated further proceedings in this court, I concluded that her remand order did not preclude this court from hearing plaintiff's renewed summary judgment motion.

In keeping with the District Court's mandate and in the interests of making a detailed record for the parties and the appellate courts who will certainly revisit the issues raised in this case, I herein set forth the court's findings of fact and conclusions of law.

JURISDICTIONAL STATEMENT

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) (the district courts shall have original and exclusive jurisdiction of all cases under Title 11), 28 U.S.C. § 157(a) (authorizing the district courts to refer all Title 11 cases and proceedings to the bankruptcy judges for the district) and General Order No. 266, dated October 9, 1984 (referring all Title 11 cases and proceedings to the bankruptcy judges of the Central District of California). The matters resolved herein are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (B).

ANALYSIS

Plaintiff is entitled to summary judgment if it can prove that there is no dispute as to a genuine issue of material fact, and it is entitled to judgment as a matter of law. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990). The moving party in a summary judgment motion has the burden of proof on each element of its claim. Grogan

v. Garner, 498 U.S. 279 (1991). Once the movant meets that initial burden, the burden shifts to the responding party to present positive evidence to establish a triable issue as to a material fact. Weg v. Macchiarola, 995 F.2d 15 (2d Cir. 1993). In a motion for summary judgment, respondent bears the burden of proof on any element that it would be required to prove at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

FINDINGS OF FACT

1. Ken International Co., Ltd. ("Ken International") is a Japanese corporation formerly engaged in the business of developing golf courses in Japan and the United States. DECREE OF THE TOKYO DISTRICT COURT DATED APRIL 28, 1992 ("April 28, 1992 decree"), Plaintiff's Exhibit A to Statement of Uncontroverted Facts at page 151;

2. Ken Mizuno owned all of the stock of Ken International from 1987 through April 1992. April 28, 1992 decree, Plaintiff's Exhibit A at page 151;

3. In March 1988, Ken International purchased all of the stock of Hitachi Kanko Kaihatsu ("HKK"), a corporation which held the right to develop a golf course in the Ibaraki Prefecture (the "Ibaraki Country Club") in Japan. April 28, 1992 decree, Plaintiff's Exhibit A at page 151;

4. Sometime between winter 1987 and fall 1988, Ken Mizuno, Ken International and a related entity, Sanki Co., Ltd. ("Sanki"), agreed that they would market memberships in the Ibaraki Country Club and that Sanki would represent to the membership purchasers than only

1,830 memberships would be sold.[4] April 28, 1992 decree, Plaintiff's Exhibit A at page 152 - 153;

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[4] In Defendants' Statement of Genuine Issues, defendants object to admission of the April 28, 1992 decree on hearsay grounds. That objection is not properly before the court and is therefore summarily overruled. LOCAL BANKRUPTCY RULE 111(k) provides:

> Evidentiary objections (i) must be set forth in a separate document, (ii) must cite the specific Federal Rule of Evidence upon which the objection is based, and (iii) must be filed with the responsive or reply Papers or may be deemed waived.

Here, defendants failed to set forth their evidentiary objections in a separate document and failed to cite the specific FRE upon which their "objection" is based.

However, in the event a reviewing court finds error in this court's decision to overrule the evidentiary objection on procedural grounds, I will proceed to make a ruling on the merits of the objection. The Japanese version of the April 28, 1992 decree is admissible pursuant to FRE 803(8) which creates an exception for public records. In addition, the court will take judicial notice pursuant to FRE 201 of the declaration of Yoichiro Yamakawa filed June 29, 1992 which avers to the authenticity of the Tokyo District Court order adjudicating Mizuno bankrupt and authenticates the English translation of that decree.

Lastly, defendants rely on the declaration of Haruhisa Yamazaki to controvert the facts found by the Tokyo District Court on April 28, 1992.

[Footnote continued on next page]

5. By summer 1991, over 52,000 memberships had been sold. April 28, 1992 decree, Plaintiff's Exhibit A at page 154 - 155;

6. At all relevant times, Ken Mizuno intended to oversell memberships in the Ibaraki Country Club to and to misrepresent the number of memberships to be sold to the purchasers. April 28, 1992 decree, Plaintiff's Exhibit A at page 157;

7. Between 1989 and 1991, Mizuno, through Ken International Co., Ltd., executed 47 separate wire transfers through which approximately $260 million was transferred into the United States.[5] GUILTY PLEA MEMORANDUM, Plaintiff's Exhibit B at page 227 - 301;

[Footnote continued from previous page]

The Yamazaki declaration however, merely states his opinion about the legal conclusions which may be drawn from the April 28, 1992 decree. It states no facts from which it might be inferred that Ken Mizuno did not engage in the fraud scheme detailed in the April 28, 1992 decree. As such, it does not satisfy defendants' burden under Weg v. Macchiarola, 995 F.2d 15 (2d Cir. 1993) to come forward with admissible evidence which would justify going to trial on the facts established by the April 28, 1992 decree. In the interests of brevity, this ruling on the admissibility of the April 28, 1992 decree and the inadequacy of Mr. Yamazaki's declaration to put any fact cited therein in controversy will apply in all instances where the April 28, 1992 decree is the source of evidence.

5 Defendants' objection to admission of the Guilty Plea Memorandum is overruled pursuant to FRE 803(8). Defendants' attempt to controvert this fact by reliance on the August 19, 1994 Stipulation and Settlement Agreement and the

[Footnote continued on next page]

8. On October 14, 1991, creditors of Ken Mizuno in Japan filed a bankruptcy petition against Mr. Mizuno in the Tokyo District Court, 20th Division. April 28, 1992 decree, Plaintiff's Exhibit A at page 151;

9. After litigation in which Mr. Mizuno appeared and contested the merits, on April 28, 1992, the Tokyo District Court found that the purchasers of the Ibaraki Country Club memberships (petitioning creditors) had "valid legal claims for damages" against Mizuno. April 28, 1992 decree, Plaintiff's Exhibit A at page 158;

10. After litigation in which Mr. Mizuno appeared and contested the merits, on April 28, 1992, the Tokyo District Court found the bankruptcy petitions filed against Ken Mizuno "well-founded," adjudicated Mr. Mizuno bankrupt, and appointed Kengo Ohashi administrator of the Japanese bankruptcy estates of Ken Mizuno, and several other related entities including Ken International Co., Ltd. April 28, 1992 decree, Plaintiff's Exhibit A at pages 117, 159;

11. On June 12, 1992, the Tokyo District Court issued a "permission" which authorized Mr. Ohashi to file involuntary bankruptcy petitions in the United States "for the purpose of recovering the assets of the bankrupt located in the United States."[6] APPLICATION FOR

[Footnote continued from previous page]

Coram Nobis petition filed in the district court. In neither document is there so much as an allegation, must less admissible evidence, which would controvert the fact that the wire transfers occurred.

6 Although Defendants' Statement of Genuine Issues disputes this fact, their dispute focuses on the legal conclusion to be drawn from the

[Footnote continued on next page]

PERMISSION dated June 12, 1992, Plaintiff's Exhibit A at page 191;

12. Mr. Ohashi filed petitions under 11 U.S.C. § 303 in the United States Bankruptcy Court, San Bernardino Division, on June 19, 1992, against Ken Mizuno and Ken International Co, Ltd. Plaintiff's Exhibit C;

13. On June 19, 1992, Kengo Ohashi filed a document purporting to waive an answer to the involuntary petition and consenting to entry of an order for relief on Ken Mizuno's behalf. CONSENT OF KEN MIZUNO TO ENTRY OF AN ORDER FOR RELIEF UNDER CHAPTER 11, filed June 19, 1992;[7]

14. An order for relief was entered against Ken Mizuno on June 19, 1992.[8] Plaintiff's Exhibit D;

15. On June 25, 1992, Ken Mizuno "by and through its [sic] administrator Kengo Ohashi" filed an application to employ the law firm of Gibson, Dunn & Crutcher ("GDC") as general bankruptcy counsel for the debtor in possession. APPLICATION OF DEBTOR FOR AUTHORITY TO

[Footnote continued from previous page]
June 12, 1992 permission, they do not dispute that it in fact was given.

7 Pursuant to FRE 201, the court takes judicial notice of this document contained in the main case file.

8 Defendants dispute (without supplying any controverting evidence) Mr. Ohashi's authority to consent to the entry of the order for relief. Ohashi's authority is a conclusion of law, not a fact.

EMPLOY GENERAL BANKRUPTCY COUNSEL, filed June 25, 1992;

16. Timothy J. Farris, Esq., acting for the Office of the United States Trustee, reviewed and made no objection to the application to employ GDC as general counsel. ID. at page 14;

17. GDC's employment was approved on June 26, 1992. ORDER AUTHORIZING EMPLOYMENT OF GIBSON, DUNN & CRUTCHER AS GENERAL BANKRUPTCY COUNSEL, entered June 26, 1992;

18. On June 29, 1992, Ken Mizuno filed a Notice of Appeal of the Order for Relief;

19. On June 29, 1992, Ken Mizuno filed an emergency motion to dismiss, or alternatively, to vacate the entry of the order for relief in the Ken Mizuno case. Plaintiff's Exhibits E, I;

20. In support of his request to have the motion to dismiss/vacate heard on an expedited basis, Ken Mizuno attached the declaration of Andrew W. Caine who testified that Kengo Ohashi had acquired control of Ken Mizuno's assets by virtue of his allegedly "improper" actions. He further testified that he had a conversation with Craig Millet of the law firm GDC on June 26, 1992 at which time he was told that "[it was] the Administrator's position that he was Ken Mizuno and Ken International, Inc. for all relevant purposes, including in the U.S." DECLARATION OF ANDREW W. CAINE, filed June 29, 1992, at page 11, ln. 14 - 16, and page 12, ln. 15 - 21.;

21. The emergency motion to dismiss was denied without prejudice at a hearing held June 29, 1992. Plaintiff's Exhibit E;

22. On July 10, 1992, Ken Mizuno objected to the employment of GDC as counsel for the debtor

in possession on the grounds that his pending motion to vacate order for relief would "result in the irrevocable removal of Mr. Ohashi as the 'Debtor in Possession' in this matter." OBJECTION TO THE EMPLOYMENT OF GIBSON, DUNN & CRUTCHER AS COUNSEL TO THE DEBTOR IN POSSESSION, filed July 10, 1992;

23. On July 13, 1992, the Tokyo District Court, 20th Division issued a clarifying "permission" in which it determined that Mr. Ohashi's consent to the entry of the orders for relief in the Ken International and Ken Mizuno cases were authorized under Japanese law. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO VACATE ORDER FOR RELIEF, filed August 19, 1992, exhibit A;

24. On July 30, 1992, Ken Mizuno "by and through his administrator Kengo Ohashi" filed a motion to approve the sale of property of the estate and to terminate the power of attorney given by Ken Mizuno to Tsutoshi "Joe" Myojo. EX-PARTE APPLICATION FOR ORDER: (1) AUTHORIZING SALE OF PROPERTY OF THE ESTATE FREE AND CLEAR OF ALL LIENS, ETC., filed July 30, 1992;

25. At the hearing on the motion to sell, Craig Millet of GDC appeared on the behalf of the debtor in possession. Andrew Caine of Pachulski, Stang, Ziehl & Young appeared on behalf of Ken Mizuno, real party in interest. MINUTES ON EMERGENCY MOTION TO AUTHORIZE SALE OF REAL PROPERTY, filed July 31, 1992;

26. The motion to sell property of the estate was granted on July 31, 1992. That order recites that the motion was brought by "Ken Mizuno, by and through his administrator Kengo Ohashi . . ." ORDER: (1) AUTHORIZING AND

APPROVING SALE OF PROPERTY OF THE ESTATE, entered July 31, 1992;

27. On August 7, 1992, Ken Mizuno's June 29, 1992 appeal of the order for relief was dismissed by stipulation of the parties;

28. On August 11, 1992, Ken Mizuno filed his third motion to vacate the entry of the order for relief (the second being denied because the matter was at that time up on appeal), on the grounds that Kengo Ohashi had no authority to consent to the entry of the order for relief. Hearing was held on August 24, 1992. Plaintiff's Exhibits E, J;

29. On October 7, 1992, this court issued its ruling which DENIED the motion to vacate on the merits. Plaintiff's Exhibit E at page 386 – 387;

30. No appeal of that order was taken within the 10 days allowed under F.R.Bankr.P. 8002(a). Plaintiff's Exhibit H at page 399;

31. On October 9, 1992, Kengo Ohashi attended the 11 U.S.C. § 341(a) meeting of creditors representing the debtor in possession. Plaintiff's Exhibit N;[9]

32. Kengo Ohashi has paid all fees owing to the Office of the United States Trustee on behalf of this estate since the inception of this case. Plaintiff's Exhibit N;[10]

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9 Defendants do not dispute the fact that Mr. Ohashi attended the section 341(a) meeting, only its relevance.

10 Defendants do not dispute the fact that Mr. Ohashi made such payments, only their relevance.

33. Kengo Ohashi has acted as the debtor in possession and exercised the administrative powers of this estate by selling estate assets. Plaintiff's Exhibit N;

34. Kengo Ohashi has acted as the debtor in possession and exercised the administrative powers of this estate by commencing numerous actions to recover assets fraudulently transferred out of this estate. Plaintiff's Exhibit N;

35. On November 18, 1992, a judgment was entered in an adversary action brought by the estate against the Mizuno Family Trust to avoid transfers of property by Mizuno into that trust. Plaintiff's Exhibit Q;

36. The United States Government filed an information charging Ken International Co., Ltd. with one count of the foreign transportation of the proceeds of fraud, in violation of 18 U.S.C. § 2314, one count of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A), one count of monetary transactions involving illegal proceeds, in violation of 18 U.S.C. § 1957, and one count of forfeiture pursuant to 18 U.S.C. § 982. GUILTY PLEA MEMORANDUM, Plaintiff's Exhibit B;

37. Ken International Co., Ltd., through Kengo Ohashi, as administrator of Ken International Co., Ltd., entered into a plea agreement through which it admitted to committing the various acts alleged in the information. GUILTY PLEA MEMORANDUM, Plaintiff's Exhibit B;

38. The plea agreement provided that Ken International Co., Ltd.'s assets were to be forfeited to the government in exchange for the government's agreement to allow all but 10% of the proceeds of the forfeited assets to be used to compensate the Ibaraki fraud victims and

payment of the estate's attorney's fees. GUILTY PLEA MEMORANDUM, Plaintiff's Exhibit B;

39. On October 27, 1993, the United States District Court for the District of Nevada entered an order pursuant to 18 U.S.C. § 982 that certain property owned by Ken International Co., Ltd. was forfeited to the United States Government.

40. November 9, 1994, the United States Government gave notice of the October 27, 1993 forfeiture order to Ken Mizuno. This notice informed him that if he claimed a legal interest in any of the [forfeit] property, that he must within 30 days file a petition pursuant to 21 U.S.C. § 853 (as incorporated by 18 U.S.C. § 982(b)(1)(A)) in the United States District Court for the District of Nevada for a hearing to adjudicate the validity of his alleged legal interest.

41. On December 6, 1994, Ken Mizuno, through his attorneys of record Dominic Gentile and Terrance G. Reed, filed a Petition for Relief from the Court's October 27, 1993 Forfeiture Order in the United States District Court for the District of Nevada.

42. The creditors in the Japanese bankruptcy case of HKK, and the United States bankruptcy cases of Ken International Co., Ltd. and Ken Mizuno are substantially identical. DECLARATION OF YOICHIRO YAMAKAWA, filed June 29, 1995 at paragraph 8.[11]

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[11] Defendants' Statement of Genuine Issues disputes this fact, however, no evidence was offered to controvert Mr. Yamakawa's declaration.

43. Defendant Ken Mizuno had knowledge of this case prior to December 6, 1994. DECLARATION OF ANDREW CAINE, filed July 10, 1992;

44. Defendant Dominic Gentile received letters enclosing documents filed in the Ken Mizuno case in late 1992. DECLARATION OF RALPH C. WINTRODE filed June 29, 1995 at paragraphs 3 and 4.

45. Defendant Dominic Gentile had telephone conversations with attorneys from the law firm of Bryan Cave on July 24, and July 27, 1992 regarding an adversary proceeding filed in the Ken Mizuno case to avoid the transfer of the Indian Wells Country Club to the Mizuno Family Trust. DECLARATION OF LILLIAN M. JAVIER, filed June 29, 1995, exhibit A;[12]

46. Defendant Dominic Gentile had telephone conversations with attorneys from the law firm of Argas & Bartlett prior to September 30, 1992 regarding an adversary proceeding filed in the Ken Mizuno case to avoid the transfer of the Royal Kenfield Country Club to the Mizuno Family Trust. DECLARATION OF H. GREGORY

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12 Defendants' evidentiary objection is overruled due to the procedural defects discussed in note 3, because the content of defendant Gentile's conversation with B.L. Churney is not hearsay insofar as the "statements" are offered only to establish defendant Gentile's state of mind (his knowledge of the bankruptcy case), FRE 801(c) and because the billing statements are admissible under the business records exception to the hearsay rule. FRE 803(6). Moreover, defendants submitted no evidence to controvert the fact that defendant Gentile had knowledge of the Ken Mizuno bankruptcy case prior to December 6, 1994.

NASKY, filed June 29, 1995, exhibit A, DECLARATION OF ANTHONY A. ZMAILA, filed August 8, 1995, exhibit A;

47. On April 10, 1995, plaintiff deposed Dominic Gentile in connection with this case. In response to several questions inquiring into his knowledge of the Ken Mizuno case, and in response to several questions asking him if he had been served with various letters and notices pertaining to the Ken Mizuno case, Mr. Gentile invoked his Fifth Amendment privilege. DECLARATION OF DOUGLAS COTTON, filed June 29, 1995 at paragraph 2.

48. Plaintiff incurred $285,687.75 in attorney's fees and $21,922.82 in costs prosecuting this adversary proceeding. DECLARATION OF RALPH C. WINTRODE, filed June 29, 1995 at para. 8.

The foregoing findings of fact are not meant to suggest that the court does not find all of the facts set forth in plaintiff's Statement of Uncontroverted Facts. In the interests of brevity, I have recited herein only the most critical facts. I have undertaken an exhaustive review of Defendants' Statement of Genuine Issues of Fact. None of the facts disputed by defendants are supported by any evidence. Thus, I conclude that no facts are truly in controversy, only the legal conclusions to be drawn therefrom.

I.

JURISDICTION

Pursuant to 28 U.S.C. § 1334(a), original jurisdiction in all bankruptcy proceedings is vested in the United States District Court. Specifically, 28 U.S.C. § 1334(e) provides:

> The district court in which a case under title 11 is commenced or is pending shall

> have exclusive jurisdiction of *all of the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate."* [emphasis added] 28 U.S.C. § 1334(e).

Pursuant to 28 U.S.C. § 157, all proceedings "arising in" or "arising under" title 11 of the United States Code are referred to the United States Bankruptcy Court. Prosecution for violation of the automatic stay is a "core matter" in bankruptcy over which the United States Bankruptcy Court is empowered to enter final orders, with or without the consent of the responding party. Budget Service Co. v. Better Homes of Virginia, Inc., 804 F.2d 289 (4th Cir. 1986).

A. 21 U.S.C. § 853(K).

Defendants perceive a conflict between the jurisdiction conferred on this court under 28 U.S.C. §§ 157 and 1334 and portions of the forfeiture statutes. 21 U.S.C. § 853(k) requires that any party seeking to recover property subject to forfeiture may do so only in the court issuing the forfeiture order. 21 U.S.C. § 853(k) does not divest a bankruptcy court of subject matter jurisdiction over an adversary proceeding unless that action seeks (i) to intervene in a criminal trial or appeal involving forfeiture of property, or (ii) it seeks legal or equitable relief *against the United States* in connection with the forfeit property. 21 U.S.C.

§ 853(k).[13] Relying on Sturge v. Smouha (In re Smouha), 136 B.R. 921 (S.D.N.Y. 1992), defendants argue that 21 U.S.C. § 853(k) divests this court of jurisdiction over this dispute.

Smouha arose out of the massive international fraud perpetrated by the Bank of Credit and Commerce International ("BCCI") and so its facts are in some respects quite similar to the case at bar. In Smouha, the foreign representatives of BCCI appointed in Luxembourg and the Cayman Islands filed ancillary proceedings in the United States pursuant to 11 U.S.C. § 304 in order to collect and repatriate BCCI's assets. One of BCCI's creditors, Sturge, filed a civil RICO action against BCCI in Florida. Prior to the conclusion of Sturge's civil RICO action, the United States indicted BCCI in the United States District Court for the District of Columbia on several criminal RICO

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[13] 21 U.S.C. § 853 provides:

. . .

(k) **Bar on intervention**

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this subchapter; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

. . .

violations including a RICO forfeiture count. As a result of a plea agreement entered into between the foreign representatives and the government, BCCI's U.S. assets were forfeited to the United States in exchange for the government's agreement to transfer approximately one half of those assets to a fund set up to compensate the BCCI fraud victims. At this point however, any similarity to our facts ends.

Unhappy with the plea agreement because it would place BCCI's assets beyond the reach of the section 304 proceeding (and diminish Sturge's recovery), Sturge filed a petition in the United States Bankruptcy Court for the Southern District of New York seeking a restraining order preventing implementation of the plea agreement. Smouha, 136 B.R. at 926. The bankruptcy and district courts in Smouha denied the request for a TRO relying in part on section 853(k)'s identical RICO cousin (18 U.S.C. § 1963) because the effect of granting the TRO would be to *enjoin the United States* from implementing a RICO forfeiture agreement, an act expressly prohibited by § 1963(i). Smouha, 136 B.R. at 927. Smouha held that Sturge's sole remedy was to file a petition in the District Court which had entered the plea agreement.

Defendants characterize plaintiff's complaint as an attempt to intervene in a criminal proceeding and as an attempt to enjoin implementation of the plea agreement and hence argue that § 853(k) divests this court of jurisdiction. Both arguments are specious at best. § 853(k) only bars intervention in a "criminal case" or suits at law or equity against the United States to adjudicate a third party's interest in forfeit property. The term "criminal case" is narrowly defined to mean only "a prosecution brought by the government to secure a sentence of conviction for criminal conduct." United States v. Lavin, 942 F.2d 177, 181 (3d Cir. 1991). A § 853(n) proceeding is not a criminal case because its outcome has no impact on the liberty

interest of a criminal defendant. Id.[14] Thus, even if it were possible to construe this action as intervention in the § 853(n) proceeding, that matter is simply not a criminal case and therefore § 853(k) presents no jurisdictional bar. Moreover, unlike Smouha, this complaint seeks no relief -- legal or equitable -- against the United States.

B. CONTEMPT OF THE AUTOMATIC STAY.

Relying on In re Sequoia Auto Brokers, Inc., 827 F.2d 1281 (9th Cir. 1987), defendants argue that this court has no power to award damages under 11 U.S.C. § 105 for violations of the automatic stay. The court need not hesitate long on this argument. Whether or not bankruptcy courts have the contempt power to punish for violation of its own orders, the Ninth Circuit has clearly recognized that Congress has vested bankruptcy courts with jurisdiction to award damages for willful violations of the stay under § 105. Johnston Environmental Corp. v. Knight (In re Goodman), 991 F.2d 613, 616-617 (9th Cir. 1993); Strachan v. Taxel (In re Pace), 159 B.R. 890, 904 (9th Cir. BAP 1993) *aff'd* 56 F.3d 1170 (9th Cir. 1995).

Accordingly, this court has subject matter jurisdiction over this adversary proceeding.

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14 I note that the Eleventh Circuit has recently held that a 21 U.S.C. § 853(n) proceeding is a civil proceeding allowing a party to recover attorneys fees under the Equal Access to Justice Act. United States v. Douglas, 55 F.3d 584 (11th Cir. 1995).

II.

STANDING

Section 323 of the Bankruptcy Code (title 11) authorizes the trustee to act as representative of the estate, and the trustee is given the capacity to sue and be sued. 11 U.S.C. § 323.[15] In a chapter 11 case, the debtor in possession succeeds to all of the rights, powers and duties of a trustee (except compensation and certain investigative duties). 11 U.S.C. § 1107; *See also* H.R. REP. NO. 595, 95th Cong, 1st Sess. 404 (1977); S. REP. NO. 989, 95th Cong. 2d Sess. 116 (1978). Because this is a chapter 11 case and no trustee has been appointed by the Office of the United States Trustee, the debtor in possession has standing to sue on behalf of the estate.

A. THE DEBTOR.

Plaintiff asserts standing to prosecute this adversary proceeding based on this court's October 7, 1992 order denying Ken Mizuno's motion to vacate the entry of the order for relief. According to plaintiff, that order determined two critical issues. First, it confirmed that the Japanese Bankruptcy Estate of Ken Mizuno was the debtor in the underlying case, and second, that Kengo Ohashi was properly in control of this estate and could act as the debtor in possession. While the court ultimately agrees with plaintiff's conclusion, referring to the Japanese Bankruptcy Estate of Ken Mizuno as the "debtor" has understandably

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15 11 U.S.C. § 323 provides:

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

created some confusion in the minds of the defendants and the District Court. Judge McLaughlin's June 23, 1995 order stated that the Japanese Bankruptcy Estate of Ken Mizuno was clearly not the debtor, and thus, Kengo Ohashi could not be the debtor in possession. In so holding, the District Court necessarily believed that the Japanese Bankruptcy Estate of Ken Mizuno and Ken Mizuno were distinct legal persons. Upon reviewing my oral recitation given on March 10, 1995, I can understand why that was the case. In order to assist reviewing courts, I offer a more complete explanation of what was meant by referring to the Japanese Bankruptcy Estate as the debtor.

This case was commenced by the filing of an involuntary chapter 11 petition on June 19, 1992. That involuntary petition named Ken Mizuno as the debtor. In its prayer for relief, it requested that an order for relief be entered against "the debtor, Ken Mizuno." INVOLUNTARY PETITION filed June 19, 1992 at page 2, ln. 5 - 6; page 12, ln. 12 - 14. An involuntary petition serves the same function as a complaint filed in any federal court litigation. *See* In re New Era Co., 115 B.R. 41, 45 (Bankr. S.D.N.Y. 1990). The involuntary petition makes certain factual allegations with respect to a debtor's financial affairs and requests that an order for relief be entered. *See* Advisory Committee Note (1983) FED R. BANKR. P. 1003. In this case, a document purporting to be the "consent" of Ken Mizuno to the order for relief was filed along with the petition. CONSENT OF KEN MIZUNO TO ENTRY OF AN ORDER FOR RELIEF UNDER CHAPTER 11 filed June 19, 1992. A consent is essentially an answer admitting to the allegations in the petition consenting to a "judgment" that an order for relief be entered. The "consent" in this case was executed by Kengo Ohashi, Administrator for Ken Mizuno. ID. at page 2, ln. 4 - 6. Thus, this case was commenced in an extraordinary manner. Kengo Ohashi both sued Mizuno alleging he was insolvent and answered for Mizuno admitting insolvency and consenting to an order for relief.

In his motion to vacate, Ken Mizuno argued that Kengo Ohashi was not eligible to consent to the entry of the order for relief on Ken Mizuno's behalf. MOTION TO VACATE ORDER FOR RELIEF filed August 11, 1992, at page 7, ln. 15 to page 9, ln. 13. He argued that 11 U.S.C. § 303(d) only permitted a "debtor" within the meaning of 11 U.S.C. 109(a) to waive answer to an involuntary petition and thereby consent to the entry of an order for relief. In response, Kengo Ohashi claimed he had authority under Articles 6, 7 and 162 of the Japanese Bankruptcy Act and two "permissions" of the Tokyo District Court to act for Mizuno with respect to his legal affairs and therefore he was authorized to answer the involuntary petition in Mizuno's stead. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO VACATE ORDER FOR RELIEF filed August 19, 1992, page 10, ln. 13 to page 13, ln. 16. In other words, Kengo Ohashi asserted that he had stepped into Ken Mizuno's shoes with regard to the exercise of his legal rights in this case. He urged this court to recognize that authority under comity principles and allow this case to proceed. Mizuno, in return, disputed Kengo Ohashi's authority to exercise Mizuno's rights in the United States, arguing that Article 3 of the Japanese Bankruptcy Act permits an administrator to succeed only to such rights and powers as the debtor may exercise in Japan. MOVANT MIZUNO'S REPLY TO OPPOSITION TO MOTION TO VACATE ORDER FOR RELIEF filed August 20, 1992, page 7, ln. 16 - 25. Because the "consent" purported to exercise Mizuno's legal rights outside of Japan, it was an *ultra vires* act. Thus, the central issue before the court in deciding the motion to vacate was whether Ohashi was empowered under Japanese law to act in Mizuno's stead with respect to his legal affairs, and whether the so-called "territoriality principle" of Article 3 of the Japanese Bankruptcy Act precluded him from exercising that power in this jurisdiction.

Because Japanese law confers on an administrator the power to appear in and defend actions involving the debtor, Art. 162, HASAN HOU

(Bankruptcy Code), Law No. 71 of 1922, to exercise control over a debtor's properties, Art. 6-7, HASAN HOU (Bankruptcy Code), Law No. 71 of 1922, to collect the debtor's mail, Art. 190, HASAN HOU (Bankruptcy Code), Law No. 71 of 1922, to make decisions regarding support for the debtor, Art. 192, HASAN HOU (Bankruptcy Code), Law No. 71 of 1922, and deprives the debtor of any further right to administer his property Art. 53, HASAN HOU (Bankruptcy Code), Law No. 71 of 1922, I concluded that a Japanese Bankruptcy Administrator acquired powers similar to those of a guardian or conservator under U.S. probate law. In other words, I concluded that Kengo Ohashi could act for Mizuno and in the place of Mizuno with respect to his property and legal affairs regarding his property. Therefore, it was permissible for him to answer the involuntary petition in place of Mizuno. Article 3 of the Japanese Bankruptcy Act did not bar Mr. Ohashi from exercising Mizuno's right to waive answer in this country for two reasons. First, the territorial limitation of Article 3 does not expressly confine the administrator's powers, only the jurisdiction of the Japanese Bankruptcy Court over certain assets.[16] Second, the Tokyo District Court issued two "permissions" which specifically authorized Mr. Ohashi to file the involuntary petition and answer it on Mizuno's behalf.[17] Clearly, the Tokyo District

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16 Art. 3, HASAN HOU (Bankruptcy Code), Law No. 71 of 1922 provides:

"[a] bankruptcy adjudged in Japan shall be effective only with respect to the bankrupt's *properties* which exist in Japan." [emphasis added].

17 In August 1992, Mizuno argued that because the "permission" which authorized Mr. Ohashi's consent was not issued until July 10, 1992, Mr. Ohashi was not properly authorized to answer in

[Footnote continued on next page]

Court believed that Mr. Ohashi's actions were proper as a matter of Japanese law, and I concluded that comity principles required recognition of Japanese law and the Japanese court judgments.

In all international insolvency cases, whether filed as voluntary cases, involuntary cases, or ancillary proceedings, a court must give due regard to the judicial acts of other nations under comity principles in order to accomplish a cooperative, fair, and cost effective proceeding. ARNOLD M. QUITTNER, *Cross-Border Insolvencies: Concurrent Japanese and United States Proceedings*, in INTERNATIONAL BANKRUPTCIES: DEVELOPING PRACTICAL STRATEGIES 628 PLI/Comm 327 app. 2 (1992). A domestic court may recognize a judgment issued by a foreign court of competent jurisdiction where the foreign state's interest in having their judgment recognized is great and recognition will not impair any domestic interests, so long as the legal processes of foreign state share our basic notions of due process. See Turner Entertainment v. Degeto Film GMBH, 25 F.3d 1512, 1519 (11th Cir. 1994).

Here, the balance of the respective national interests clearly favored acknowledging Mr. Ohashi's authority to act for Ken Mizuno in this case. Ken Mizuno was/is a Japanese national who committed tortious acts in Japan against other Japanese citizens. Attached as an exhibit to the involuntary petition was the declaration of Yoichiro Yamakawa, who

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[Footnote continued from previous page]

Mizuno's behalf as of June 19, 1992, the day the "consent" was filed. MOVANT MIZUNO'S REPLY TO OPPOSITION TO MOTION TO VACATE filed August 20, 1992, page 8, ln. 3 - 5. However, I rejected this argument because the July 10, 1992 permission on its face indicated that it only purported to clarify the permission earlier given. It was not a "new" source of authority.

authenticated translations of the April 28, 1992 decree of the Tokyo District Court and the June 12, 1992 "permission" of that same court. The April 28, 1992 decree was issued after trial in which Mizuno appeared and presented evidence.[18] It makes elaborate fact findings concerning Mizuno's participation in the scheme to defraud the Ibaraki victims.[19] In addition,

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18 At page 5 of the English translation of the April 28, 1992 decree adjudicating Ken Mizuno bankrupt, the court states "Neither the evidence marked as 'No. A-41-3' nor 'B-1,' nor the testimonial evidence given by the debtor himself, all of which purported to deny the above facts, were convincing to the court."

19 At page 7 of the English translation of the April 28, 1992 decree, the court states with respect to Mizuno's liability:

"Nevertheless, the Debtor . . . dared to tell and instruct Sanki, when engaging the latter's services in publicly selling or offering to sell Membership Units, to raise from purchasers of the Membership Units as much as 50 billion yen in aggregate . . . . In addition, while debtor was fully aware that Sanki was at all times publicly selling or offering to sell the Membership Units, using the misrepresentation that only 1,830 regular Membership Units were available for purchase in total . . . the Debtor permitted Sanki to continue such illegal trade practices . . . . Hence, this court believes that the Debtor, in association with Sanki and others, illegally induced the purchasers of the Membership Units . . . and continued to publicly sell or offer to sell the Membership Units which in fact had extremely little investment value, making false representation to the contrary, and thereby willfully infringed and damaged the rights and interest of the

[Footnote continued on next page]

the declaration of Kengo Ohashi, via an authentication of the allegations contained in the involuntary petition, states that a significant portion of the fraud proceeds were transferred to the United States, and with those illegally obtained proceeds, numerous assets were acquired in the names of others for Mizuno's benefit.[20]

The obvious purpose of the Japanese bankruptcy proceedings and the decrees issuing therein was to remedy the harm Mizuno committed by first defrauding and then secreting assets away from his legitimate creditors. Clearly, the Japanese courts had a substantial interest in seeing that its citizens were made whole. Conversely, this country had little or no interest in denying recognition to Mr. Ohashi's authority. United States jurisdiction was invoked solely because Mizuno was successful in secreting the fruits of his fraud into the United States. All creditors of this estate were/are Japanese citizens. Hence, there were simply no domestic interests to protect. Moreover, the Office of the United States Trustee, the arm of the United States Department of Justice charged with overseeing the administration of all bankruptcy cases, had been given notice of these proceedings and did not object to Mr. Ohashi's actions, including his exercise of the estate's administrative powers through conducting asset sales. Thus, the United States government's interest in efficient administration of bankruptcy proceedings cannot have been impaired by

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[Footnote continued from previous page]
purchasers of the Membership Units including petitioners and that therefore Petitioners do have valid legal claims for damages against the Debtor."

20 Pursuant to LOCAL BANKR. RULE 111(k), for the Central District of California, verifications of motions are not sufficient to constitute evidence, unless otherwise ordered. Mizuno has not at any time objected to this evidence and so it is accepted despite this defect.

acknowledging Mr. Ohashi's authority to act in Ken Mizuno's stead.

From the outset, everyone involved understood that the natural living breathing debtor in this case was Ken Mizuno. Thus, in a non-technical sense, Ken Mizuno was and is the debtor. However, § 303(d) is concerned with who has the right to exercise certain legal rights, specifically, the right to waive answer to the involuntary petition. "Debtor" for purposes of § 303(d) is thus defined by reference to who holds these legal rights. Because I concluded Mr. Ohashi was authorized to act in Mizuno's stead, he could be understood to be the "debtor" in this narrow legal sense. So, by referring to the Japanese Bankruptcy Estate of Ken Mizuno as the "debtor" it is not meant to suggest that a legal entity distinct from Ken Mizuno is the debtor. The Japanese Bankruptcy Estate of Ken Mizuno is not a legal person under U.S. law, it is merely a way of expressing that Mizuno ceased acting for himself with respect to his legal and property affairs after April 28, 1992. It is in this respect that the October 7, 1992 order confirmed that Kengo Ohashi had the right to exercise whatever rights United States bankruptcy law conferred on Ken Mizuno.

B. THE DEBTOR IN POSSESSION

As plaintiff correctly notes, Kengo Ohashi's authority to exercise the powers of the debtor in possession was also at issue in the motion to vacate decided on October 7, 1992. From June 19, 1992 onward, Kengo Ohashi exercised all powers of the debtor in possession in this case. The Office of the United States Trustee, the Japanese Creditor body, and, most importantly, Ken Mizuno were aware of that fact at the time the motion to vacate was brought.

On June 25, 1992, Kengo Ohashi filed an application seeking to employ the law firm of Gibson, Dunn & Crutcher ("GDC") as "attorneys for debtor and debtor in possession." Paragraph 9 of that application itemized eight specific activities GDC

would undertake including: filing all schedules and other materials required by the Federal Rules of Bankruptcy Procedure and the Office of the United States Trustee; appearing in court on all matters brought before it regarding the debtor; to investigate, locate, and obtain control over assets; to prosecute avoidance actions, etc. All of these activities are normally undertaken by counsel to a trustee or debtor in possession. This application was reviewed and approved by Timothy J. Farris, Esq., acting for the Office of the United States Trustee.

On June 30, 1992, Kengo Ohashi filed a motion to sell property of the estate. That motion was nominally brought by "Ken Mizuno, the debtor and debtor in possession herein, by and through his administrator, Kengo Ohashi . . . " EX-PARTE APPLICATION FOR ORDER: (1) AUTHORIZING AND APPROVING SALE OF PROPERTY OF THE ESTATE, etc. filed July 30, 1992, at page 1, ln. 22 - 24. On July 8, 1992, Mizuno objected to an order GDC prepared denying Mizuno's first motion to vacate the order for relief. In that objection, Mizuno characterized GDC as "the purported representative of the debtor in possession." OBJECTION TO ORDER ON EMERGENCY MOTION TO DISMISS CASE OR IN THE ALTERNATIVE TO VACATE ORDER FOR RELIEF filed July 8, 1992, at page 1, ln. 24 - 27. Based on the foregoing record, all parties in interest were aware that Kengo Ohashi was acting as the debtor in possession prior to Mizuno's motion to vacate.

Although the legal argument in connection with Mizuno's motion to vacate focused on the propriety of Mr. Ohashi's consent to the entry of the order for relief, it was obvious to all parties, including Mizuno, that Mr. Ohashi's continued right to act as the debtor in possession hinged on the outcome of that motion. As indicated above, Kengo Ohashi took the position that Japanese law and the Tokyo District Court decrees empowered him to exercise whatever rights were conferred upon Mizuno in this bankruptcy case. Since the ability to exercise the powers of the debtor in

possession were rights ordinarily exercisable by a debtor, the logical inference to be drawn from Mr. Ohashi's position was that he could exercise those rights and powers in Mizuno's stead. Ken Mizuno clearly understood this, for on June 29, 1992, his counsel filed a declaration stating that Kengo Ohashi took the position that he was Ken Mizuno for all relevant purposes. DECLARATION OF ANDREW W. CAINE, filed June 29, 1992, at page 11, ln. 14 - 16, and page 12, ln. 15 - 21. Moreover, on July 10, 1992, he filed a formal objection to GDC's employment claiming that Mizuno's pending motion to vacate the order for relief would result in Mr. Ohashi's removal as debtor in possession. OBJECTION TO THE EMPLOYMENT OF GIBSON, DUNN & CRUTCHER, filed July 10, 1992.[21] Thus, at stake in the motion to vacate was more than just the propriety of Mr. Ohashi's consent to the order for relief. If the court were to conclude that it was permissible for Mr. Ohashi to exercise Mizuno's right to waive answer to the involuntary petition, it would also be acknowledging that he had the authority to act for him in all other respects in this case, including the right to be the debtor in possession. By denying Mizuno's motion to vacate, the October 7, 1992 order confirmed that Kengo Ohashi had the authority to waive answer on Ken Mizuno's behalf and necessarily, that he could legitimately exercise the rights and powers of the debtor in possession in this case.

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21 That objection, on page 1 ln. 24 - 28 reads:

> As the court is aware, Mizuno has a pending motion to vacate the entry of the order for relief in this matter which, if granted, would result in the irrevocable removal of Mr. Ohashi as the "Debtor in Possession" in this matter. His removal will preclude the employment of Gibson, Dunn & Crutcher for the Debtor in Possession.

Once again, comity principles militated in favor of acknowledging Mr. Ohashi's authority to act for Ken Mizuno in exercising all of the powers of a debtor in possession. The April 28, 1992 decree of the Tokyo District Court appointed Kengo Ohashi administrator of Mizuno's Japanese bankruptcy case. As a result of that decree and Japanese law, he was charged with a duty to collect and liquidate the debtor's assets for the benefit of Mizuno's creditors. Art. 164 HASAN HOU (Bankruptcy Code), Law No. 71 of 1922. Mr. Ohashi was also under a duty to report on the status of the bankruptcy case to representatives of the Japanese creditor body. Art. 172 HASAN HOU (Bankruptcy Code), Law No. 71 of 1922. The Japanese creditor body was co-terminus with the creditors of this estate, consequently, Mr. Ohashi already owed many of the same duties toward this estate's creditor body as would be imposed on any domestic debtor in possession or bankruptcy trustee. *See* In re Petition of Kojima, 177 B.R. 696, 699 (Bankr. D. Colo. 1995).

On June 12, 1992, the Tokyo District Court issued a "permission" authorizing Mr. Ohashi to file an involuntary petition against Mizuno in the United States, and, significantly, to "initiate related proceedings against interested parties of the above assets." It was known to Ohashi at the time he sought this permission that Mizuno had transferred most of his U.S. property into the names of family members, friends, and associates and that this property could only be recovered using the avoidance powers of this court. Avoidance actions may be maintained only by the estate either through a trustee or a debtor in possession. 11 U.S.C. § 548(a); Hollar v. United States, 174 B.R. 198, 203 (M.D.N.C. 1994). By granting Ohashi permission to commence recovery actions -- actions only the estate could undertake -- the Japanese court clearly intended and desired that Ohashi act in Mizuno's stead with respect to exercising the administrative powers of this estate.

Since October 1992, Kengo Ohashi has exercised all of the administrative powers of this

estate, including the prosecution of a fraudulent transfer action against the Mizuno Family Trust which directly impacted Ken Mizuno. Until this adversary proceeding was commenced, Ken Mizuno made no further issue respecting Kengo Ohashi's authority to act as the debtor in possession. Mizuno's apparent abandonment of this issue is a significant consideration in this case. As indicated in the October 7, 1992 order, this court intended to file formal findings of fact and conclusions of law within 60 days after entry of the order. However, because no appeal was taken of that order, the need to formalize findings and conclusions became less of a priority and was forced to yield to the court's regular calendar. Had an appeal been taken, this court would have entered formal findings and conclusions and a reviewing court would have had the opportunity to reverse any aspect of that decision were it to have been in error.

So too, Mizuno never attempted to exercise any of the powers of a debtor in possession in this case. He never sought appointment of a trustee, Kengo Ohashi's removal as debtor in possession, nor did he object to his standing in any adversary proceeding until the estate sued him for the instant alleged stay violation. Had he done so, any ambiguity in the record as to Mr. Ohashi's authority to represent this estate would have been promptly clarified. Instead, Mizuno waited until most of the work in this estate was concluded and a fund of over $40 million existed before asserting his claim that everything Mr. Ohashi had done was improper and that he, Mizuno, had a legitimate right to the funds. *See* VERIFIED PETITION OF NEXT FRIEND KEN MIZUNO FOR A WRIT OF ERROR *CORAM NOBIS* ON BEHALF OF DEFENDANT KEN INTERNATIONAL CO., LTD., filed July 11, 1995 in the United States District Court, District of Nevada, exhibit 5 to the declaration of Jonell Thomas filed August 14, 1995.

Defendants raise five challenges to plaintiff's standing, each of which are discussed separately below.

C. THE UNITED STATES DISTRICT COURT'S JUNE 23, 1995 ORDER.

Preliminarily, defendants argue that the order of the United States District Court entered June 23, 1995 conclusively determined that Kengo Ohashi lacked standing to prosecute this action on behalf of the estate. They claim that the mandate rule, the doctrine of the law of the case, and the principles of res judicata and collateral estoppel prevent this court from making any determination as to plaintiff's standing.

I cannot agree with the fundamental premise of defendants' argument that the June 23, 1995 order conclusively determined the standing issue. Although the district court could not find that plaintiff had standing, that court specifically denied defendants' request to amend the remand order to provide that this court may only take action to dismiss the adversary proceeding. The district court did so knowing that plaintiff had refiled the instant summary judgment motion. I interpret this to mean that the district court did not determine that plaintiff's standing was a legal impossibility.

Moreover, the district court's order on its face states that the record before it was insufficient to conclude that Ohashi was appointed trustee or that the Bankruptcy Estate of Ken Mizuno was the debtor in the underlying case. *See* Plaintiff's Exhibit H at page 397. Lastly, the court's decision to remand, as opposed to simply dismissing the case, is a further indication to this court that the district court did not intend its ruling on standing to be the final word on this issue. Because I conclude that the District Court made no final determination on the issue of plaintiff's standing, defendants' citation to the doctrine of mandate, law of the case, and res judicata/collateral estoppel is inapposite.

D. 11 U.S.C. § 1101.

Defendants challenge Ohashi's standing to sue on the estate's behalf arguing that Ohashi is neither the debtor in possession nor the trustee in this case. According to defendants, § 1101 restrictively defines the debtor in possession to mean only the debtor in a chapter 11 case.[22] They argue that because Ohashi is not the debtor in this case, he cannot be the debtor in possession and hence, he cannot represent the estate. I disagree. For the reasons discussed above, this court's October 7, 1992 order concluded that Kengo Ohashi was authorized under Japanese law to exercise whatever rights were conferred upon Ken Mizuno by United States bankruptcy law. However, even if that conclusion were in error, this court still had the power to replace Mizuno as debtor in possession by someone who was not the debtor or a trustee appointed by the Office of the United States Trustee.

E. 11 U.S.C. §§ 1107 & 105.

The statutory authority of bankruptcy courts to decide who is entitled to exercise the powers of a debtor in possession is well recognized. In re Gaslight Club, Inc., 782 F.2d 767, 771 (7th Cir. 1986). Section 1107(a) specifically provides that a debtor in possession exercises the administrative powers of the estate subject to "such limitations and conditions as the

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22 11 U.S.C. § 1101 provides:

> In this chapter--
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> (1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case.
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> . . . .

court prescribes." 11 U.S.C. § 1107(a).[23] Clearly, § 1107 reposes discretion in the bankruptcy court to regulate a debtor in possession's exercise of administrative powers. By conferring the power to "limit and condition" a debtor in possession's exercise of administrative powers, this section in effect gives the bankruptcy court the power to eliminate an individual debtor in possession's power to act for the estate. Hence, Mr. Mizuno's right to represent the estate would have been properly terminable without appointment of a chapter 11 trustee. Section 105(a)'s "all writs" power has been recognized to confer on the bankruptcy court the ability to transfer the administrative powers of the estate to persons who are not themselves the debtor in possession.[24] Gaslight, 782 F.2d at 771. In essence, §§ 1107 and 105 combine to allow the bankruptcy court to install a new debtor in possession in an appropriate case.

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23 11 U.S.C. § 1107 provides:

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this title.

24 11 U.S.C. § 105 provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

. . .

In Gaslight, several affiliated corporations filed chapter 11. Robert Fredricks was president and majority shareholder of Gaslight, and the court designated him to perform the functions of debtor in possession. After eight months without failing a plan and disclosure statement, the creditors committee requested that the court replace Fredrick's with a Mr. Brandt, an unrelated entity, who would thereafter act as a debtor in possession. Initially, the United States Trustee opposed designation of Mr. Brandt to act as debtor in possession arguing that such a designation usurped their authority to appoint a chapter 11 trustee. Gaslight, 782 F.2d at 769. The United States Trustee's office ultimately withdrew that objection and on August 30, 1983, Brandt was authorized to "'perform the duties imposed upon the debtors by the applicable provisions of the Bankruptcy Code' and gave him 'full and exclusive power to employ [and] discharge . . . all managers, officers, directors, agents, employees and servants of the debtors, as he may deem necessary and advisable . . . .'" Id. When Brandt fired Fredricks, Fredricks sought vacation of the order designating Brandt to act as debtor in possession. Fredrick's renewed the United States Trustee's argument that the order was improper because it usurped the OUST's authority to appoint a chapter 11 trustee. Based on §§ 105 and 1107, the Seventh Circuit held that the bankruptcy court had the power to interfere with corporate management when doing so would protect creditors' interests. Gaslight, 782 F.2d at 770. The Seventh Circuit went on to add that:

> Sections 105(a) and 1107(a) of the Bankruptcy Code provide adequate authority for the Bankruptcy Court to approve the replacement of the person designated to perform the duties and exercise the rights of the debtor in possession if the creditors committee, the person presently in control and the majority controlling shareholder of the

debtor agree with this course of action. Gaslight, 782 at 771.

Recognizing that this case differs from Gaslight in that our debtor is an individual and Mr. Mizuno did not consent to installing Mr. Ohashi as the debtor in possession, the principle at issue in the same: where the interests of creditors demand it, the bankruptcy court may intervene and designate an individual to exercise the rights and duties of a debtor in possession. Section 105(a) specifically allows the court to act *sua sponte*, therefore, Mizuno's consent to his removal as debtor in possession under § 1107 is irrelevant.[25] So too, the fact that Mizuno is an individual is irrelevant to the court's power under § 105 to transfer certain powers and duties of the debtor in possession to another.[26] The administrative powers of the

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25 Section 105(a) provides:

"No provision of this title providing for the raising of an issue by a party in interest shall be construed to *preclude the court from, sua sponte,* taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

26 The court is aware of In re Martin, 26 B.R. 39 (Bankr. S.D. W.Va. 1982), a case which declined to designate a chapter 11 debtor's widow as the "successor" to the DIP after his death. Although it opined that the power to appoint a "successor" may be available under § 105, it ultimately declined to do so finding no statutory authority for such an appointment. However, Martin was decided before Gaslight, (a Seventh Circuit case) and failed to take into account § 1107(a). Therefore, I find it unpersuasive. Moreover, it specifically stated that appointment of a "successor" was not

[Footnote continued on next page]

bankruptcy estate must be exercised for the benefit of the estate. The potential harm to creditors of allowing a malfeasant debtor to exercise administrative powers is the same whether the debtor is an individual, a partnership or a corporation. Because the powers of a debtor in possession are largely co-terminus with the powers of a chapter 11 trustee (who would be a stranger to an individual debtor), an individual debtor cannot claim that there is a subset of administrative powers that may not be alienated from an individual debtor. Thus, § 1101's definition of debtor in possession does not preclude persons who are not the debtor from exercising that function.

F. RES JUDICATA.

As indicated above, the motion to vacate settled the question of Kengo Ohashi's authority to act as the debtor in possession in this case. No one appealed that order in the time permitted by FED. R. BANKR. P. 8002, thus, making the order unreviewable. Defendants, however, contend that the order denying Mizuno's motion to vacate was final (requiring immediate appeal) because id did not include formal findings of fact and conclusions of law and consequently, the question of Mr. Ohashi's authority may be re-litigated. I disagree.

Denial of a motion to vacate the entry of an order for relief is a final order appealable as a matter of right. Mason v. Integrity Ins. Co. (In re Mason), 709 F.2d 1313, 1317 (9th Cir. 1983) (order denying the motion to vacate the order of relief was final requiring immediate review because it is conclusive on the change in the legal relationship of the bankruptcy to his assets); *see also* Elliot v. Four Seasons Properties (In re Frontier Properties), 979 F.2d 1358,

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compelled under the facts of that case. Here, I find Mr. Mizuno's fraudulent conduct to make out a quite compelling case.

1363 (9th Cir. 1992); Dunkley v. Rega Properties (In re Rega Properties, Ltd., 894 F.2d 1136, 1138 (9th Cir. 190). Here, defendant Ken Mizuno had a full and fair opportunity to (and in fact did) litigate on the merits the entry of the order for relief and Kengo Ohashi's authority to waive answer on his behalf in bringing his motion to vacate the entry of the order for relief. On October 7, 1992, this court issued an order denying that motion. The order was not appealed in the 10 days permitted by Rule 8002.

G. THE OCTOBER 7, 1992 ORDER'S FINALITY.

Defendants contend that by failing to supplement the October 7, 1997 order with formal findings of fact and conclusions of law, that order never became sufficiently final. However, defendants' own authorities demonstrate that findings and conclusions were unnecessary to make the order final. Orders obtain sufficient finality for appeal purposes where the order constitutes a "complete act of adjudication" and clearly evidences the judge's intention that it be the court's final act in the matter. Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir. 1990). In Slimick, a chapter 7 trustee objected to a debtor's claim of exemption. On June 11, 1985, a hearing was held and the court took the matter under submission. The judge advised the parties that, unless one of the parties wanted to appeal, the decision he rendered would simply say "sustained" or "overruled." Slimick, 928 F.2d at 305. On June 17, 1985, the bankruptcy court entered its order sustaining the trustee's objection. On October 31, 1985 the court entered findings and conclusions prepared by the trustee and a judgment thereon was entered on November 15, 1985. On November 25, 1985, the debtors appealed the judgment, within 10 days of entry of judgment, but more than 10 days from entry of the order sustaining the objection. Id., 928 F.2d 304.

In addressing the first prong of the finality test, Slimick reasoned that an order constitutes a complete act of adjudication where is resolves all issues involved in the motion before it. Slimick, 928 F.2d at 307. Here, Mizuno's motion filed August 11, 1992 sought an order of this court vacating the order for relief on the ground that Kengo Ohashi had not authority to consent to its entry. Mizunos' motion requested one judicial act, and hence, placed only one matter in issue. The October 7, 1992 order denied Mizuno's request and thus, terminated Mizuno's motion. The October 7, 1992 order did not reserve any issues, nor did it condition its effectiveness on any subsequent event. It left nothing further to be decided with respect to that motion and therefore, the October 7, 1992 order was a complete act of adjudication.

In addressing the second prong of the finality test, Slimick held that the judge's intent that an order be final must be determined by reference to the content of the order and the conduct of the judge and the parties. Slimick, 928 F.2d at 308. Orders are presumed final unless a contrary intent appears on their face. Id. Here, the court took the matter under submission on August 24, 1992 hearing. On October 7, 1992, the court issued its order DENYING the motion to vacate.[27] As indicated by the italicized

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27 The full text of the order reads:

> The hearing of the motion of alleged Real Party in Interest, Ken Mizuno, for an order vacating the order for relief entered by this court on June 19, 1992, came on regularly for hearing before the undersigned United States Bankruptcy Judge on August 24, 1992. [Appearances noted.]
>
> Following oral argument, the Court took the matter under submission. *Now, having*

[Footnote continued on next page]

text, the court expressly stated that it had considered the matter and had come to a decision. Notwithstanding the fact that the face of the order states that a decision had been made, defendants argue that when an order states an intention to later file formal findings and conclusions, it is not a final order. Defendants rely primarily on Maddox v. Black, Raber-Kief & Assoc., 303 F.2d 910 (9th Cir. 1962) and Munich v. United States, 330 F.2d 774, 775 (9th Cir. 1964). However, these authorities are distinguishable from the case at bar.

In Maddox, a taxpayer sued the Territory of Guam challenging a tax assessment made under the Business Privilege Tax of Guam. Presumably after conclusion of trial, the district court entered an order which read "Judgment of Petitioner. Counsel for Petition to prepare Findings of Fact, Conclusions of Law, and Judgment." Maddox, 303 F.2d at 911. In Munich, a convicted defendant brought a motion to

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researched and considered the matter, the court makes its order, as follows: [emphasis added.]

ORDER

IT IS ORDERED, ADJUSTED AND DECREED that the motion of alleged Real Party Ken Mizuno for an order that the order for relief entered in this matter on June 19, 1992 be vacated, [sic] is DENIED.

It is the intention of the Court to file a Memorandum of Decision setting forth its findings and conclusions within 60 days of the entry of this order.

DATED: October 2, 1992

SIGNED: Lynne Riddle
United States Bankruptcy Judge

vacate and set aside his sentence. The judge's order read "The Government will prepare and lodge appropriate findings and all other documents necessary for disposition of these proceedings." Munich, 330 F.2d at 775. Although it did not clearly apply the rule to the facts of its case, Maddox cited the same two-part finality test as Slimick. Maddox, 303 F.2d at 911. Munich, however, articulated no test for finality at all. Munich, 303 F.2d at 775.

In a district court trial or adversary proceeding in the bankruptcy court, a judgment fixes the facts and extent of liability for or against a party, and sets the stage for further actions to enforce the judgment. *See* FED R. CIV. PROC. 58. Formal findings of fact and conclusions of law are *required* in all actions not tried to a jury. FED. R. CIV. PROC. 52(a). Maddox held that the district court's order was not final because "It required further acts before any judgment came into existence" implicitly equating the operative legal effect of the document with "complete act of adjudication." Maddox, 303 F.2d at 911. So too, Munich held that an order was not final under circumstances where further findings must be made and documents prepared in order to "fully dispose" of the proceeding. Munich, 330 F.2d at 775. Thus, Maddox and Munich both rested on the fact that no independent legal significance could be attached to those orders, that is, the orders were not immediately operative without additional documents.[28]

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28 Assuming, arguendo, that Maddox and Munich rested on the judge's subjective intent element of the finality test, their facts are still distinguishable from the case at bar. In both cases, the judge required *counsel* for the parties to file formal finding and conclusions. In such circumstances, the court must undertake its own independent review and determine if those findings and conclusions comport with the judge's decision. That further consideration is a

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Here, we are not dealing with an adversary proceeding, rather, a matter brought on the court's regular law and motion calendar. Orders, not judgments, conclude relief requested by motion. Local Bankr. Rule 116(1). Hence, all that was necessary to conclude the Motion to Vacate the Order for relief was an order denying or granting the motion: the October 7, 1992 order plainly served that purpose. Formal findings and conclusions are not required in the motion setting. Slimick, 928 F.2d at 307; *see also* LOCAL BANKR. RULE 116(1)(b) (findings and conclusions required only by F.R. BANKR. P. 7052, F.R. BANKR. P. 7065 or as otherwise ordered by the court). The addition of formal findings and conclusions would in no way alter the fact that Mizuno's motion had been denied. Therefore, the absence of formal findings and conclusions did not alter the finality of the October 7, 1992 order, and accordingly, the defendants are precluded from challenging Kengo Ohashi's standing to bring this action.

[Footnote continued from previous page]

judicial act. Here, it was the *judge* who, after taking the matter under submission, prepared the order and who intended to later file formal findings and conclusions. In this situation, the judge's mind was clearly made up when the order was entered. After having the matter under s submission for six weeks, the judge was not under any compulsion (other than due regard for the interests of the parties and the efficient administration of the case) to render a decision. By issuing the order couched in present tense, immediately operative language, the court clearly stated that a decision had been made. *See* Slimick, 928 F.2d at 308.

H. IN REM EFFECT OF THE ORDER FOR RELIEF.

Defendants Reed and Gentile argue in the alternative that even if the October 7, 1992 order was final as to Mizuno because findings and conclusions were unnecessary and Mizuno did not appeal it in the time allowed under Rule 8002, they may still challenge the order because they were not parties to that proceeding and consequently, they are not bound by its outcome.

In an involuntary chapter 11 case, a debtor acquires its status as a debtor in possession upon entry of the order for relief. In re Wedgewood Golf Assoc., Ltd., 86 B.R. 711, 714 (Bankr. M.D. Fla. 1988). Entry of the order for relief vests all administrative powers in the debtor of possession. California State Board of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 849, 109 S.Ct. 2228, 2230 (1989); *see also* 2 COLLIER ON BANKRUPTCY, ¶ 323.01 (15th ed. 1995). Included among those powers is the power to represent the estate. 11 U.S.C. § 323. Thus, the creation of a debtor in possession and the investiture of that debtor in possession with the ability to represent the estate are integral aspects of the order for relief.

An order for relief in bankruptcy is an order IN REM and is thus conclusive as to all the world. Mason v. Integrity Ins. Co. (In re Mason), 704 F.2d 1313, 1317 (9th Cir. 1983); *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-368 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978). Because the order for relief is in IN REM, and the debtor in possession's capacity to represent the estate is an integral aspect of that order, Mr. Ohashi's capacity to represent the estate is to be accorded IN REM effect as well. Consequently, defendants Reed and Gentile may not re-litigate plaintiff's capacity to represent this estate even though they were not parties to the motion to vacate.

I. OWNERSHIP OF CLAIMS.

Defendants further challenge plaintiff's standing on the theory that he is not seeking to prosecute claims belonging to this estate. Relying on Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988), defendants argue that the plaintiff, even if he were empowered to represent the estate, still lacks standing because a trustee may not litigate claims belonging to the estate's creditors against third parties. Defendants argue that because the property Mizuno seeks to recover will be delivered to the Japanese bankruptcy estate of HKK, any claims arising from defendants' improper filing of the relief from forfeiture petition belong to the creditors of HKK and hence, this estate, whoever controls it, cannot sue on their behalf. Defendants argument, however, fails to realize that interference with a person's property rights directly damages the person who has the present right to control that property. An action for violation of 11 U.S.C. § 362(a)(3) (which prohibits acts to exercise control over property of the estate) is conceptually quite similar to a conversion action. In both cases, the defendant wrongfully asserts control over property to which the plaintiff has rightful possession. The directly damaged party, and hence, the proper plaintiff in a conversion action is the person who has the present right to possess the converted asset. *See* 5 WITKIN'S SUMMARY OF CALIFORNIA LAW *Torts* §§ 617 - 619 (1988 & Supp. 1995). Here, as will be discussed more fully below, the estate was the only entity with a legitimate right to file the relief from forfeiture petition. Mizuno's filing of the petition thus interfered with the estate's right to control that property right, hence, it is actionable directly by the estate.

Accordingly, I conclude that Kengo Ohashi has standing as the representative of this estate to prosecute defendants' alleged stay violation.

III.

VIOLATION OF THE STAY

Our bankruptcy system is designed to resolve all claims against a debtor and property of a debtor in a single proceeding. Instead of allowing the parties to litigate their non-bankruptcy law rights and remedies in a multiplicity of state and federal court proceedings, Congress opted for a single forum in order to minimize transaction costs and ensure an equitable distribution to creditors. RICHARD V. BUTLER AND SCOTT M. GILPATRIC, *A Re-Examination of the Purposes and Goals of Bankruptcy*, 2 AM. BANKR. INST. L. REV. 269, 270-277 (1994). A single forum reduces the net cost of pursuing claims against the debtor and the debtor's property by making all property available for distribution to creditors, 11 U.S.C. § 541(a), and replacing non-bankruptcy law litigation with the claims allowance process. 11 U.S.C. § 502(b); FED. R. BANKR. P. 3001; BUTLER AND GILPATRIC, 2 AM. BANKR. INST. L. REV. at 272-273.

The automatic stay plays a key role in administering this system. It prevents a single party from wresting property away from the estate unless proper notice has been given to parties in interest and the protection afforded by the Bankruptcy Code prove inadequate. 11 U.S.C. § 362(d); United States v. Whiting Pools, Inc., 462 U.S. 198, 204, 208 (1983); Paccom Leasing Corp. v. Deico Elec., Inc. (In re Deico Elec., Inc.), 139 B.R. 945, 947 (9th Cir. BAP 1992). Violations of the automatic stay cannot be taken lightly, given the potential for individual action to disrupt the whole bankruptcy system. Johnston Environmental Corp. v. Knight (In re Goodman), 991 F.2d 613, 620 (9th Cir. 1993) *quoting* In re Crysen/Montenay Energy Co., 902 F.2d 1098, 1105 (2d Cir. 1990).

Pursuant to 11 U.S.C. § 362(a), the filing of a petition under 11 U.S.C. § 303 operates as a stay

applicable to all entities. Specifically, section 362(a)(3) imposes a stay on any act to obtain control over property of the estate. 11 U.S.C. § 362(a)(3).[29] By § 362(a)(3)'s express terms, the automatic stay cannot be violated unless the defendant acted to exercise control over property of the estate.

Property of the estate includes "all legal or equitable interests in the debtor in property as of the commencement of this case." 11 U.S.C. § 541(a); California v. Farmers Markets, Inc. (In re Farmers Markets, Inc.), 792 F.2d 1400, 1402 (9th Cir. 1986). When a case is commenced, all interests of the debtor in property pass to the estate, none remain in the debtor. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 367-68 (1977); S. REP. NO. 989, 95th Cong., 2d Sess. 82-83 (deleting § 8 of the former Bankruptcy Act as unnecessary because once the estate was created, no property interests remain in the debtor). Unmatured rights and interests in property pass to the estate so long as they are "rooted in a debtor's pre-bankruptcy past." Kokoszka v. Belford, 417 U.S. 642, 647

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29 11 U.S.C. § 362 provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of --
>
> . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.
>
> . . .

(1974); Barowsky v. Serelson (In re Barowsky), 946 F.2d 1516 (10th Cir. 1989).

A. THE RIGHT TO FILE A PETITION UNDER 21 U.S.C. § 853(N).

21 U.S.C. § 853(n) confers the right to be relieved of an order of forfeiture on bona fide purchasers and third parties who held a title superior to that lost by the defendant in the forfeiture action. United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987). Only title holders qualify for § 853(n) relief. *See* United States v. Campos, 859 F.2d 1233 (6th Cir. 1988) (title owner's creditors do not qualify for § 853(n) relief). Thus, entitlement to relief under § 853(n) cannot be severed from the title to the forfeit property. As such, the right to be relieved of forfeiture is an incident of the § 853(n) claimant's title to the forfeit assets. For without having title, one cannot qualify for § 853(n) relief.

Here, the titles to the real and personal properties claimed by Mizuno in the § 853(n) petition were indisputably acquired before June 19, 1992. If Mizuno's § 853(n) petition were to succeed in recovering property from the United States, he would succeed in keeping pre-petition assets away from his creditors. As such, his right to file the relief from forfeiture petition is an interest in property "rooted in the debtor's pre-petition past." By operation of 11 U.S.C. § 541(a), that interest passed to the estate on June 19, 1992. Thereafter, it was the estate, not Ken Mizuno, who had the entitlement (if any) to relief under § 853(n).[30]

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30 Having asserted in the petition filed with the United States District Court in Nevada that he holds superior title to Ken International Co., Ltd. in the assets forfeited to the government, Ken Mizuno is judicially estopped from denying in this proceeding that this estate is the title

[Footnote continued on next page]

Mizuno's actions in seeking to reap the benefits of the § 853(n) petition are essentially the same as of he discovered, long after filing bankruptcy, that some error entitled him to a tax refund allocable to a pre-petition tax year. The bankruptcy estate's failure to assert the right to a refund does not confer a right on the debtor to do so. 11 U.S.C. § 521(4) imposes an affirmative duty on an individual debtor to turn all property owner over the estate. 11 U.S.C. § 521(4). That duty extends to property of the estate discovered post-petition. Barbee v. Barry (In re Barry), 170 B.R. 179, 183 n.1 (Bankr. S.D. Fla. 1994). Thus, when Mizuno was given notice of his right to file a § 853(n) petition, he was under a duty to turn that right over to the estate. By failing to do so he asserted control over the estate's right to file a section 853(n) petition and thereby violated section 362(a)(3).

B. THE PLEA AGREEMENT.

Property of the estate includes not just property owned by the debtor on the petition date, but the proceeds of estate property as well. 11 U.S.C. § 541(a)(6); In re Reed, 940 F.2d 1317 (9th Cir. 1991). What constitutes "proceeds" is not defined in a restrictive sense, but rather covers all conversions in the form of property. H.R. REP. NO. 595, 95th Cong., 1st Sess. 367-86 (1977); S. REP. NO. 989, 95th Cong., 2d Sess. 82-83 (1978). It is undisputed that whatever property Mizuno legitimately owned which he now seeks to recover in via his § 853(n) petition, Mizuno owned on June 19, 1992, the date this case commenced. As a result, § 541(a) drew that property into the estate. However, realizing that these assets were potentially subject to forfeiture,[31] the estate of

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[Footnote continued from previous page]
owner of the subject assets. *See* Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990).

31 At the outset of this case, it was not entirely clear to the estate whether the assets would in
[Footnote continued on next page]

Ken International Co., Ltd. negotiated an agreement with the United States that would allow forfeiture of the assets to the government in exchange for the government's agreement to return the lion's share of those assets to the Japanese fraud victims. Thus, this estate's ownership interest in the Mizuno property was converted into the plea agreement. Thus, the plea agreement is a form of "proceeds" of the property forfeited by the estate of Ken Mizuno.

The question remains however, as to whether the plea agreement constitutes an "interest in property?" Plaintiff has argued that the estate holds a legal right to seek revocation or enforcement of the plea agreement in the event the United States failed to live up to its obligation to return the forfeited property to the Japanese fraud victims and that this right constitutes an interest in property belonging to the estate. Because the estate of Ken Mizuno is not a party to the plea agreement, I question -- without so holding -- if this is possible. However, whether or not this estate has a cognizable legal claim in the plea agreement, it seems to hold an equitable interest therein.

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fact be subject to forfeiture. By virtue of its powers under § 544, the estate may have been entitled to assert an "innocent owner" defense to the forfeiture action under 18 U.S.C. § 981(a)(2). However, due to a split of authority, the strategy of seeking to contest the forfeiture was subject to great legal uncertainty. *Compare* Eggleston v. Colorado, 873 F.2d 242 (10th Cir. 1989) (innocent owner defense not available unless party was owner prior to commission of illegal acts); United States v. A Parcel of Land, Buildings, Appearances and Improvements, 937 F.2d 98 (3d Cir. 1991) (innocent owner's interest need not vest prior to commission of illegal act).

Equitable interests in property are recognized by certain "indicia" of equitable ownership. The transfer of consideration from one party to another is one factor which may confer an equitable interest in property on the transferor. *See* Soliman v. Spencer (In re Spencer), 115 B.R. 471, 480 (D. Del. 1990) *quoting* 3 POMEROY'S EQUITY JURISPRUDENCE § 981 (5th ed. 1941). A second factor is whether or not a party bears the risk of loss from some adverse change in the value of the property. Rupe Inv. Corp. v. Commissioner, 266 F. 2d 624, 630 (5th Cir. 1959). Recognition of an equitable interest however, does not hinge on a party's present ability to enjoy the benefits of the property at issue. In re Continental Airlines, Inc., 134 B.R. 536, 542 (Bankr. D. Del. 1991). Here, the estate gave up whatever claim it had to Mizuno's property in exchange for the government's agreement to use the funds in large part to compensate the creditors of this estate (through HKK). Thus, this estate has transferred something of value to the United States. Moreover, if the plea agreement lost value (because the assets held by the government experienced an adverse change in value), this estate would remain liable to a greater extent that no loss of value occurred and so that loss of value would be experienced by this estate. Thus, were the United States to breach its agreement to distribute the proceeds of the forfeit property in the manner contemplated by the plea agreement, it appears that this estate holds a cognizable equitable interest which would give it standing to seek enforcement of the plea agreement. The petition filed in the Nevada District Court on its face seeks to interfere with implementation of the plea agreement and hence, it was an act to exercise control over the estate's interest in the plea agreement.

C. 11 U.S.C. § 362(B)(1)

Section 362(b)(1) precludes the automatic stay from affecting any action taken by a governmental entity in pursuance of its police or regulatory power. Defendants argued that because the § 853(n) petition relates to the criminal proceeding against Ken

International Co., Ltd., the stay does not apply to the § 853(n) action. This argument is wholly without merit. First, § 362(b)(1) only exempts government entities from the effect of the automatic stay. Ken Mizuno is not a government entity. Moreover, assuming arguendo that § 362(b)(1) applied to actions taken by non-governmental entities in response to a criminal proceeding brought by the government, *see* Gordon v. Whitmore (In re Merrick), 175 B.R. 333, 336 (9th Cir. BAP 1994) (holding that responsive actions in actions brought by a debtor are not stayed), the § 853(n) proceeding cannot be characterized as a response to the Ken International Co., Ltd. criminal proceeding. It is an entirely separate and distinct action.

The criminal forfeiture action commenced by the government against Ken International was brought pursuant to 18 USC § 982. Criminal forfeiture actions are IN PERSONAM actions. United States v. Certain Real Property Located at 2525 Leroy Lane, West Bloomfield, MI, 910 F.2d 343, 347 (6th Cir. 1990), *cert. denied* 499 U.S. 947 (1991) (holding that conviction on a criminal forfeiture count pursuant to 21 U.S.C. § 853(a)(2) did not forfeit innocent spouse's entireties interest in real property). That is, the proceeding is conclusive only as to the criminal defendant's rights vis-à-vis the United States. The rights of other claimants remain untouched by that action. To avoid the loss of one's property rights, a third-party claiming an interest in the property must file a petition for relief from forfeiture within thirty days of receiving notice by the government. 21 U.S.C. § 853(n). No property rights are lost until thirty days after notice is served. *See* TERRANCE G. REED, RICO FORFEITURES, FORFEITABLE "INTERESTS," AND PROCEDURAL DUE PROCESS, 62 N.C. L.Rev. 57, 102 (1983).

By 21 U.S.C. § 853(n)(6)'s express terms, the non-defendant petitioner can only prevail in a relief from forfeiture action if they can prove they are a bona fide purchaser or that they have a title to the property

which is superior to that of the defendant or the government.[32] The basis for a section 853(n) petitioner's claim of necessity must be the assertion of property rights distinct from the interests lost by the criminal defendant in the forfeiture action. Thus, the filing of a petition for relief from forfeiture is separate from and not a response to the criminal forfeiture action because it concerns property rights which were not at issue in the criminal forfeiture action, and hence, is not exempted from the stay under section 362(b)(1). *See also* United States v. Lavin, 942 F.2d 177 (3d Cir.

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[32] 21 U.S.C. § 853(n) provides:

. . .

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that ---

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was *vested in the petitioner rather than in the defendant,* or was *superior to any right, title, or interest of the defendant* at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a *bona fide purchaser for value* of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

The court shall amend the order of forfeiture in accordance with its determination.

1991) (filing a § 853(n) petition creates a civil, not a criminal proceeding).

Therefore, defendants' actions in the Nevada District Court are not exempted from the effect of the automatic stay pursuant to 11 U.S.C. § 362 (b)(1).

D. CONSTITUTIONAL RIGHTS.

Lastly, defendants seek to characterize Mr. Mizuno's petition for relief from forfeiture as an attempt to vindicate his constitutional rights and therefore, the interests he sought to vindicate were not "interests in property" passing to the estate. This argument is without merit. Each of the constitutional violations alleged in the petition for relief from forfeiture are premised on an improper "taking" (so to speak) of his property rights. By operation of section 541, Mr. Mizuno's property rights passed to the estate. Any constitutional infirmity respecting the government's taking title to this property injured the estate alone. Mizuno simply had no property interests which could be damaged. In any event, to characterize this complaint as attempting to preclude Mizuno from exercising his individual constitutional rights is a gross distortion of the relief it seeks. This complaint is, quite simply, only aimed at precluding him from asserting control over property he no longer has a right to control.

Mizuno also argues that it was necessary for him to file the § 853(n) petition in order to preserve his right under the Fifth Amendment Double Jeopardy Clause to evade a pending criminal indictment in the District of Nevada. Among other things, the Double Jeopardy Clause prohibits the government from twice punishing a defendant for the same offense. In 1994, the Ninth Circuit determined that civil forfeiture actions were "punishment" for double jeopardy purposes and hence, where the government is successful in obtaining a civil forfeiture of a defendant's property, it can not thereafter seek to deprive the defendant of his or her liberty. *See* United

States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994). However, before an accused may suffer double jeopardy, he or she must have once been in jeopardy. Serfass v. United States, 420 U.S. 377, 393 (1975). Recently, the Ninth Circuit held that forfeiture proceedings against property abandoned by a criminal defendant do not implicate the defendant's double jeopardy rights. United States v. Cretacci, ___ F.3d ___, 1995 U.S. App. LEXIS 20618, 7 (9th Cir. 1995) (decided August 4, 1995). Thus, it appears that to be penal within the purview of the double jeopardy clause, the forfeiture action must have caused a forfeiture of property actually owned by the criminal defendant. Here, § 541(a) transferred ownership of the property Mizuno seeks to recover to the bankruptcy estate. As Mizuno had no ownership interest at the time of forfeiture, he held no cognizable constitutional interest in filing the relief from forfeiture petition.

IV.

WILLFUL VIOLATION OF THE STAY

A "willful" violation of the stay requires a showing of two things: (1) that the defendant had knowledge of the stay, and (2) that the act taken was an intentional act. Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227 (9th Cir. 1989). Filing the relief from forfeiture petition was clearly an intentional act, therefore, plaintiff must prove that defendants had knowledge of the stay at the time the violative acts were taken, namely, on December 6, 1994.

A. DEFENDANTS ' KNOWLEDGE OF THE STAY.

Defendant Ken Mizuno

Ken Mizuno, through his (then) attorneys Pachulski, Stang, Ziehl & Young, filed his third motion to vacate the entry of the order for relief on

August 11, 1992. His first motion to vacate the entry of the order for relief was denied without prejudice because, at the time, it was unclear whether Pachulski Stang had actual authority to act on Mr. Mizuno's behalf.[33] On July 10, 1992, Andrew Caine filed a declaration which attached a declaration of Ken Mizuno (along with declarations attesting to the authenticity of Mr. Mizuno's declaration). Mr. Mizuno's declaration states that he had learned of the bankruptcy cases filed in this court, and that he had hired the Pachulski firm to represent him in those proceedings.[34] Thus, by appearing in and contesting the bankruptcy case, Mr. Mizuno clearly had knowledge of the case well before December 6, 1994.

Defendant Dominic Gentile

According to the declarations of Ralph C. Wintrode, H. Gregory Nasky, Anthony A. Zmaila, and Lillian N. Javiez, defendant Dominic Gentile clearly had knowledge of this case as far back as 1992. Mr. Wintrode's declaration establishes that various notices relating to this case were served on Mr. Gentile

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33 Ordinarily, the court does not require attorneys to prove they have authority to act for their clients. This court certainly does not question the integrity or honesty of Andrew Caine or the Pachulski firm. However, because the persons to whom Mizuno transferred property in the United States had a clear motive to oppose the entry of the order for relief, they had a motive to misrepresent themselves as Ken Mizuno to the Pachulski firm. Therefore, the court deemed it prudent to require some proof that Mr. Mizuno had in fact retained that firm to represent him. That evidence was satisfactorily provided on July 10, 1992.

34 Pursuant to FRE 201, the court can take judicial notice of documents filed in this case.

in the fall and winter of 1992. Mr. Nasky's declaration establishes that he personally had a conversation with Mr. Gentile in which they discussed the bankruptcy case prior to October 1992. Mr. Zmaila's declaration authenticates a letter addressed to Mr. Gentile which enclosed a document filed in the Ken Mizuno case. Ms. Javier's declaration establishes that attorneys from the law firm of Bryan Cave (who represented Indian Wells Country Club, an asset of this estate) spoke to Mr. Gentile regarding pending adversary matters as early as July 1992. Lastly, when confronted with this information in a deposition, defendant Dominic Gentile invoked his Fifth Amendment privilege. (A rather extraordinary step given that this is a civil proceeding and it is unknown what potential criminal liability he faced by answering the questions). In any event, this court may draw a negative inference from Mr. Gentile's invocation of his Fifth Amendment privilege. Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 1558 (1976). Defendant Gentile has proffered no contravening evidence and consequently, the court cannot but conclude that Dominic Gentile clearly had knowledge of this case prior to December 6, 1994.

Defendant Terrance Reed

Plaintiff has not provided any evidence establishing that defendant Terrance Reed knew of the Ken Mizuno bankruptcy case on December 6, 1994. Therefore, the record at this stage of the proceeding is insufficient to conclude that Terrance Reed had knowledge of the stay on December 6, 1994.

B. REMEDIAL MEASURES.

Despite its inability to prove that Mr. Reed had knowledge of the stay at the time the relief from forfeiture petition was filed, plaintiff still seeks to hold Mr. Reed liable for a willful stay violation because he failed to take any remedial action after learning of the stay Plaintiff relies on two cases, Taxel v. Electronic Sports Research, Inc. (In re Cinematronics, Inc),

111 B.R. 892, 898 (Bankr. S.D. Cal. 1990) and Adams v. Philadelphia Housing Authority (In re Adams), 94 B.R. 838, 851 (Bankr. E.D. Pa. 1989) for the proposition that "when one learns of [a] bankruptcy filing and/or the impact of the stay, a party who has acted in violation of the stay without previous knowledge of the debtor's bankruptcy filing is obliged to take any reasonable action to undo a previous innocent stay violation." The law is clear that a party is under a duty to take reasonable actions to remedy a stay violation once they acquire knowledge of the stay. *See* Vahlsing v. Commercial Union Ins. Co., 928 F.2d 486, 491 (1st Cir. 1991) (collecting cases); In re Carlsen, 63 B.R. 706, 711 (Bankr. C.D. Cal. 1986). This duty arises at the time knowledge of the stay is acquired.

Here, plaintiff's evidence establishes that defendant Reed knew of the Mizuno bankruptcy case on January 11, 1995. Thus, his duty to take remedial steps arose on that date. However, Mr. Reed was sued on the same day he apparently learned of the bankruptcy case and thus, he had no opportunity to take any remedial action. Plaintiff cannot impose liability on defendant Reed through this lawsuit for his actions after this adversary action was filed because the complaint makes no allegation or offers any theories of recovery for his post-lawsuit conduct. In other words, the complaint states no claim related to Mr. Reed's post-lawsuit. conduct. Therefore, plaintiff can have no recovery thereby.

V.

DEFENSES

Defendants argue that even if their stay violation was willful, they cannot be held liable because the invocation of various constitutional rights shields them from liability. As indicated above in the discussion of the Cretacci case, Ken Mizuno has no double jeopardy right to vindicate by filing the § 853(n) petition because he did not own the property which was forfeit

to the government. So too, all of the alleged constitutional violations did not damage Mizuno because he had no interest in the property which was forfeit to the government. Cloaking his theories in the Constitution does not erase the fact that his § 853(n) was intended to recover assets allegedly owned pre-petition and which are now intended to be transferred to this estate's creditors, acts which are totally at odds with the purpose of the automatic stay.

Defendant Gentile further asserts that he is immune from any liability for advising Mr. Mizuno about his constitutional rights. Relying on Maness v. Meyers, 419 U.S. 449 (1975), he claims that criminal defense counsel cannot be held liable for advising a client about how to vindicate his or her constitutional rights because if that were allowed, it would chill a criminal defendant's enjoyment of his or her Sixth Amendment right to effective counsel. Mr. Gentile, however, is confused about what conduct gave rise to his liability. Here, Mr. Gentile is not being held liable for merely giving advice, as was the case in Maness. He is liable because he actively assisted Ken Mizuno in filing the § 853(n) petition knowing of the automatic stay.

VI.

DAMAGES

Once a stay violation is established, an aggrieved party is entitled to compensation under § 105 for damages proximately caused by defendant's willful violation of the stay. Johnston Environmental Corp. v. Knight (In re Goodman) 991 F.2d 613, 620 (9th Cir. 1993). Attorney's fees are a compensable form of damage in stay violation actions only if the defendant's conduct was egregious, or where resort to legal action was necessary to prevent further violations of the stay. *See* McHenry v. Key Bank (In re McHenry), 179 B.R. 165, 168 (9th Cir. BAP 1995) (decided under § 362(h)). Here, defendant Mizuno and Reed's actions were clearly egregious given their knowledge of the

stay and their admitted effort to secure the assets for Mizuno's personal benefit.[35] Plaintiff's attorney fee damages are established by paragraphs 7, 8 and 9 of the declaration of Ralph Wintrode. Copies of Gibson, Dunn & Crutcher's billing statements are attached as exhibit 1 to that declaration. Defendants have failed to make any objection to this evidence, nor have they made any argument attacking the reasonableness or necessity of those fees. Defendants' only defense to the awarding attorney fee damages is their claim that GDC has an intractable conflict of interest and therefore is not entitled to any compensation from this estate. Defendants' theory is misguided for two reasons. First, it ignores that Kengo Ohashi is properly in control of this estate. Moreover, if it were later to turn out that GDC was barred from compensation due to a conflict, the creditors of this estate, not the defendants herein, should be the ones to benefit from relieving the estate from the obligation to compensate GDC. It would be improper for this court to make an advisory ruling on GDC's fee application, especially where doing so would result in a windfall to the defendant wrongdoers.

VII.

INJUNCTIVE RELIEF

By prevailing on the merits, plaintiffs are entitled to injunctive relief where no adequate legal remedy exists and the balance of hardships favor the granting of an equitable remedy. Continental Airlines,

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35 Mizuno's eleventh hour conversion into an honest debtor who promises to return any assets recovered to the estate is simply unbelievable in light of counsel's admission in open court at the first summary judgment hearing on March 8, 1995. At that time, Mr. Reed admitted that Mizuno filed the petition for his own benefit, not that of the estate.

Inc. v. Intra Brokers, Inc., 24 F.3d 1099, 1104 (9th Cir. 1994). Equitable relief is appropriate where a plaintiff is likely to suffer damages from a defendant's continuing conduct, and those damages are difficult to measure. Continental Airlines, 24 F.3d at 1105. Here, the continued prosecution of the § 853(n) petition would result in a continued interference with property rights belonging to this estate. Moreover, the administration of this estate will be complicated and delayed unless defendants cease prosecution of Mizuno's § 853(n) petition. The funds currently held by the United States cannot be distributed pursuant to the plea agreement until a final order of forfeiture is issued by the Nevada District Court. Mizuno's § 853(n) petition is an impediment to conclusion of that proceeding.

The damages suffered by this estate are at this point exceedingly difficult to measure. The costs for continued administration of this estate during the period of delay caused by the § 853(n) petition are certainly foreseeable, but hard to quantify. In addition, this estate may be entitled to recover damages for appreciation in the Yen value compared to the dollar (because the Yen has decreased in value to approximately ¥ 97 to $1.00). Plaintiffs are not now seeking recovery of Yen appreciation damages and therefore this court declines to rule on the estate's entitlement to such damages.

The balance of the hardships clearly favors granting the injunction. As indicated above, Ken Mizuno has no cognizable property or constitutional interest in continued prosecution of the 853(n) petition. All of the assets which are the subject of the 853(n) petition are pre-petition assets. By operation of 11 U.S.C. § 541(a), Ken Mizuno ceased having any interest in those assets on June 19, 1992. Moreover, as the above discussion of the Cretacci case demonstrates, Ken Mizuno has no legitimate constitutional interest to vindicate in prosecuting the § 853(n). Therefore, the harm to him of granting the injunction is *de minimis*. Conversely, the estate faces

continued interference with its property rights, and potentially substantial losses flowing from fluctuations in currency exchange rates.

VIII.

CONCLUSION

Based on the foregoing, I conclude that plaintiff has met its burden to show that there is no triable issue of fact and that plaintiff is entitled to a judgment as a matter of law that all defendants, Mizuno, Gentile and Reed, violated the automatic stay. Accordingly, summary judgment as to the first claim for relief against all defendants is GRANTED.

Plaintiff has met his burden of proof to establish that defendants Mizuno and Gentile willfully violated the automatic stay and that they are liable for damages. Accordingly, summary judgment on the second claim for relief against defendants Mizuno and Gentile is GRANTED. Judgment will be entered against defendants Mizuno and Gentile, jointly and severally, in the amount of $285,687.75 in fees and $21,922.82 in costs.

Plaintiff has not carried its burden to show that defendant Reed's actions were willful. Therefore, plaintiff's motion for summary judgment against defendant Reed on the second claim for relief is DENIED.

Summary judgment as to the third claim for relief is GRANTED as to all defendants. An injunction shall issue forthwith prohibiting defendants from further violating the stay.

This Memorandum of Opinion constitutes the findings of fact and conclusions of law required by

Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure. A separate order and judgment shall be issued concurrently herewith.

Dated: Sep 5 1995

LYNNE RIDDLE
United States Bankruptcy
Judge

ADDENDUM TO MEMORANDUM OF DECISION

The following is unnecessary to the determinations made here. But since what bankruptcy judges are so often admonished to do when exercising their discretion is consider "the totality of circumstances" on a "case-by-case" basis, it was our hope that a further discussion of some of the unique issues, tensions and considerations raised by these proceedings might be useful to understanding -- or criticizing - - the decisions made.

At the time of the filing of these petitions the area of "international insolvency" proceedings was in its infancy. The matters' novelty was further complicated by their international criminal aspects. At all times concurrent with the pendency of the bankruptcies in the Central District of California, criminal investigations and prosecutions were occurring in the United States District Court for the District of Nevada. Generally, the bankruptcy court was not informed regarding the criminal actions; only occasionally was there mention of a seizure of estate property by the U.S. Government (such as the taking of a Mizuno airplane -- a DC-9). There were also news accounts, and undoubtedly some rumors, that Mr. Mizuno led a lavish or flamboyant lifestyle in the U.S.; these reports included, among other things, Las Vegas gambling losses in the tens of millions of dollars and "tips" to professional golfers in the ten of thousands.

In my judicial experience, the Mizuno cases are atypical in a very fundamental way; these estates were not the product of "legitimate but unfortunate" business or investment ventures. These "estates" were created solely by Mr. Mizuno's incredible criminal conduct. The "creditor-body" is certainly unique, being comprised solely of the 52,000 Japanese victims. The

property of "their" estate, i.e. the "spoils," is located in the U.S.

Undoubtedly these cases were and are also unique to Mr. Ohashi and his counsel. At the time he was instructed by the Japanese Court to file proceedings in the U.S. to recover Mizuno and Ken International assets, the bankruptcy literature suggested that as a "foreign representative" under 11 U.S.C. § 101(24), he had only two options to commence a case under the Bankruptcy Code: (1) file a case ancillary to a foreign proceeding under 11 U.S.C. § 304, or (2) file an involuntary petition under 11 U.S.C. § 303(b)(4). It was then, and still is, unclear what his, and the court's, powers were and are under each of those sections.

Because at commencement Mizuno had already transferred all known U.S. assets owned or controlled by him to other persons or entities, the limited powers afforded to a foreign representative under § 304 were of little or no benefit to Mr. Ohashi. To recover property fraudulently or preferentially conveyed, Mr. Ohashi needed the "strong arm" powers of a bankruptcy trustee. In addition, no automatic stay is provided in an ancillary proceeding. Therefore, had Ohashi filed under § 304, Mizuno and others could continue to use, hold, or transfer "estate" property with impunity. Thus, for those and other reasons, it appeared his only option was to file an involuntary petition under § 304(b)(4).

Yet, had Mr. Ohashi simply filed involuntary petitions and awaited a determination as to whether Mizuno and Ken International were "not generally paying [their] debts as [they] came due," there was every reason to believe, given Mizuno's past frauds, that "his" property would be further secreted or transferred during the "gap" period.

Then too, there was the question of what Chapter to use. While Mr. Ohashi might have filed an involuntary Chapter 7 and moved concurrently for the

appointment of an interim trustee to take immediate possession of the estate's assets, that step could have resulted in irreparable loss because of time required for the trustee's "learning curve", and other delays. Further, there was a concern whether any Chapter 7 panel trustee and his or her counsel, (or Chapter 11 trustee and counsel, for that matter) could sustain the enormous financial burden (and potential for huge losses if no property could be recovered) of funding investigations (involving two countries) and litigation (since every potential recovery required a lawsuit), and thereafter securing (since it is expensive, for instance, to secure and store a DC-9 aircraft), holding, protecting, marketing and selling Mizuno's deeply secreted assets held by his reluctant cohorts.

Additionally, it seemed very doubtful to the court that Mr. Mizuno kept, and had available for a newly appointed Chapter 7 trustee's benefit, accurate books and records of his asset acquisitions, transactions and transfers made from the spoils of his criminal dealings. Finally, were a Chapter 7 trustee appointed, the estate would incur trustee fees pursuant to the Code's formula; fees to a Chapter 11 trustee would be even higher. The payment of such fees would, of course, reduce the funds available to the Japanese victims.

On the other hand, the court was informed that Mr. Ohashi had financial resources available to retain and assure compensation to his American bankruptcy counsel. Lastly, and admittedly without having knowing any facts to support my hunch, I assumed that Mr. Ohashi came to the United States armed with proprietary information obtained during the Japanese civil and criminal investigations which would lead him to the whereabouts not only of Mizuno's assets, but of Mizuno's U.S. based cohorts who controlled estate property (perhaps surreptitiously). For the foregoing reasons and others, I determined that (1) Mr. Ohashi was in the best position to serve the mandate of the Japanese Court to recover property for the benefit of

the fraud victims in Japan, and (2) a Chapter 11 case was the best Code vehicle to achieve that purpose.

As to the "Chapter 11", it was clear from the beginning it was not a typical case; there was never an intention to "restructure" or "reorganize." In fact no plan, no disclosure statement, no confirmation -- and certainly no discharge -- was ever contemplated by the estate, the court or the Office of the United States Trustee. No Section 341(a) notices were sent to the 52,000 Japanese creditors; there was no meeting of creditors. *See* 11 U.S.C. § 341(a). Nor were the victim–creditors invited or instructed to file proofs of claim with this court. The "plan" was always to locate, seize, and distribute, pursuant to Japanese law, the Mizuno "spoils" to his Japanese victims.

Questions were raised early on, as is discussed more fully in the body of the Memorandum, regarding the entry of the order for relief on the same day as the involuntary petitions were filed. As to the Ken International case, I reasoned and determined that because the Japanese Court had given Mr. Ohashi the right and duty to exercise dominion and control over all Ken Mizuno's property, including his 100% interest in the stock of Ken International Co., Ltd., then Ohashi had the power to act in the corporation's stead -- including the authority to consent to an order of relief on the corporation's behalf. That belief on my part was supported by the fact the Japanese Court, following several days of trial before a three judge Tokyo tribunal, had just published a decision which detailed Mizuno's fraudulent conduct and adjudicated Mizuno and Ken International insolvent.

As to the entry of the order for relief in Mizuno's case, having examined the Japanese record and deciding that the application of the doctrine of comity was appropriate, it made little judicial or economic sense to set a trial on the issue of whether Ken Mizuno (and Ken International) was paying his debts as they came due. And while not in any way necessary to my determination to accord recognition to

the Japanese Court's decisions, I could not even imagine the difficulty of conducting a trial in California where (1) all the witnesses were Japanese citizens, residing in Japan, and likely not fluent in English; (2) all relevant documents were in Japanese; and (3) Ken Mizuno, the primary witness, was incarcerated in Japan awaiting trial on tax evasion charges. Under the circumstances, I determined that no answer to the petition or trial on the merits was even possible, let alone necessary. At the same time I felt completely certain that the immediate entry of the order for relief was not only justified under the circumstances, but absolutely essential to achieving the purposes of the Bankruptcy Code. While it may have appeared that Mr. Mizuno was initially deprived of his right to fundamental due process, he did have the opportunity, which he almost immediately exercised, to request that the court reconsider its action and vacate the order for relief.

Finally, the immediate entry of the order for relief was essential to Mr. Ohashi under the circumstances; he had to act without delay, by filing adversary proceedings and obtaining ex parte restraining orders to enjoin the removal or encumbering of the known Mizuno assets. Without resort to these statutory devices it was virtually certain that assets would forever vanish.

This court recognizes that this has not been a typical Chapter 11 case. In fact the Ken Mizuno and Ken International cases, and my determinations in them, have been described as "bizarre" (and worse). Primarily, I believe this adjective was used because Mr. Mizuno has not been accorded the usual assumptions (and "rights") regarding his competence to act as a debtor in possession. And, strange as it seems even to me at this time, it never occurred to me to notice a hearing under § 1104 to determine whether Mr. Ohashi should be appointed as trustee for the estate or allowed to act as the representative. Ohashi, who has acted for the estate since commencement, has never been officially appointed as trustee. Yet, curious

as that may be, it is even "curiouser" that now in August 1995, for the first time -- after more than three years -- and notwithstanding the fact that Mr. Mizuno has been represented before the court, by various counsel, continuously since July of 1992, he has now come forward to challenge the propriety of permitting Mr. Ohashi to appear and act on behalf of the estate as opposed to allowing him, Mizuno, to act as debtor in possession, i.e., to control the assets of the estate. Could this new interest in debtor's "fiduciary" duty be connected to the fact that the estate is now about ready to deliver some $42,000,000 of recovered "spoils" to the Japanese bankruptcy estates for delivery to his victims? To my mind, even if it now seems bizarre that I failed to officially order the appointment of Mr. Ohashi as Chapter 11 trustee, it would be an even more bizarre (perhaps grotesque) application of bankruptcy law, under the "totality of [these] circumstances," to insist that "due process" and fairness require this court to be blind to the facts proved in the Japanese Court; that Mr. Mizuno is insolvent; that Mr. Mizuno is a crook; that Mr. Mizuno has already had his day in court on those issues; that neither Mr. Mizuno nor anyone acting on his instructions, could be trusted to act as a fiduciary for the benefit of all those he has previously victimized. Mr. Ohashi has demonstrated throughout that he is competent, knowledgeable and trustworthy.

I share the foregoing hoping our experience may be helpful to others who may find themselves with a similar case. If in retrospect this court has taken a wrong path now and then, those errors may be averted by the next traveler. At all times we have recognized that this matter did not fit neatly into the usual "involuntary" or "Chapter 11" mold, but throughout we have acted to comply with Congress' intent regarding foreign insolvency representatives being accorded the use of our courts to recover assets in this country belonging to estates outside our borders.

At least some part of Congress' intent is set forth in the language that defines the scope of

proceedings under § 304. The statute instructs the bankruptcy judge that in making its determinations, it "shall be guided by what will best assure an economical and expeditious administration of such estate...," and at the same time must consider the (1) just treatment for all claimants, (2) protection of claimants in the U.S., (3) prevention of preferential and fraudulent dispositions of estate property, (4) distribution of estate proceeds substantially consistent with the order prescribed under Title 11, (5) comity, and, (6), if appropriate, an opportunity for a fresh start for the debtor. 11 U. S. C. § 304(c).

We close this Addendum with some guidance from Collier which summarized that

> Section 304, together with the related provisions of 303, 305 and 306, attempts to accommodate the special needs of representatives appointed in foreign insolvency proceedings and charged with the responsibility if securing the debtor's United States assets for the benefit of all creditors. Prior to the enactment of the Code, a foreign representative could not initiate a bankruptcy case in the United States. Although courts in the United States, as a matter of comity, frequently recognized rights asserted by foreign representatives, a number of cases in the 1970s made clear that the orderly and equitable administration of multinational insolvencies would be facilitated by opening the bankruptcy courts to foreign representatives and giving bankruptcy courts the flexibility required to address the multitude of issues that can arise in a multinational case.

3 Collier on Bankruptcy, 15th ed., ¶ 304.01.